

**Pages 1 to / à 5  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

Standing Committee on Finance

FINA • NUMBER 082 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, May 26, 2015

Chair

Mr. James Rajotte

...

We'll bring forward the officials for part 3, divisions 18 and 20.

Division 18 deals with the Ending the Long-gun Registry Act, and  
division 20 is sick leave and disability programs.

We have officials from Public Safety and from Treasury Board.

Welcome to the committee.

Perhaps I'd ask one official from Public Safety and one official  
from Treasury Board to give a brief overview of these two divisions.

We'll start with Public Safety. Mr. Potter, would you be doing  
that?

•(1130)

Mr. Mark Potter (Director General, Policing Policy Directorate,  
Law Enforcement and Policing Branch, Department of  
Public Safety and Emergency Preparedness): Good morning.

Many of you will recall that in October 2011, the ending the longgun  
registry bill was introduced in the House. In April 2012, the  
Ending the Long-gun Registry Act came into force. That act had two  
primary objectives. The first was to end the registration of long guns  
in Canada. The second was to destroy the long-gun registry data.

The second objective of destroying the data is primarily to respect the privacy rights of Canadians who had registered their long guns. The amendments in the budget implementation act are intended to comprehensively address that second objective by ensuring that no other act of Parliament, including the Access to Information Act, would compromise that key objective of destroying the data. Put simply, the amendments to the budget implementation act address a gap in the original Ending the Long-gun Registry Act.

Thank you.

The Chair: Thank you, Mr. Potter.

(....)

The Chair: Thank you for your presentation.

Colleagues, we have time for three five-minute rounds, so essentially each party will have time for five minutes.

(....)

Mr. Nathan Cullen: (....) In terms of the registry, also in looking for precedents, it's a backdated change to the law, essentially. Is that correct? You called it a gap.

Mr. Mark Potter: Exactly. This is a unique situation where you're actually ending a program, the registration of long guns, and it flows from that, that you would not have any legitimate purpose to keep the data. To fully achieve that objective, you do need in this case to address that gap, putting in place retroactive legislation.

Mr. Nathan Cullen: Okay. So retroactive legislation is an

interesting precedent and it's a worrisome precedent for some privacy advocates. It's illegal to destroy federal documents under the law, correct?

Mr. Mark Potter: Under normal circumstances, it's not appropriate to do that. But the clear objective of the Ending the Long-gun Registry Act was to destroy the data, so that was the clear will of Parliament.

Mr. Nathan Cullen: Yet it wasn't imagined that somebody would seek out the information this way?

Mr. Mark Potter: Exactly. Hindsight is 20/20 and this was clearly an omission, and this gap is now being addressed through these amendments.

Mr. Nathan Cullen: Yet we now have the OPP investigating this. This is a very dangerous precedent, is it not? It would enable future governments, if they so chose, under different circumstances that they called unique, to backdate legislation to retroactively change the law to allow something that was illegal now to be made legal. Is the department not at all concerned with the jurisprudence, the precedent-setting nature of this?

Mr. Mark Potter: No, I think this is a unique situation where there was a specific requirement and a specific provision to destroy the data.

Mr. Nathan Cullen: I understand, but I'm trying to think of another circumstance in which government backdated legislation, retroactively changed the law to make something legal that was at

the time illegal. I'm not sure how it's going to stand up in a court of law. More importantly, as it's been raised by many, we're setting a precedent by allowing government this kind of power and accepting this kind of power.

Aside from the issue that's in front of us in particular, this precedent for government to go back in time and retroactively make a thing that was illegal now legal seems on the surface very dangerous.

Mr. Mark Potter: I think in general I would say that the amendments were fully consistent with the original intent of the Ending the Long-gun Registry Act.

Mr. Nathan Cullen: Do you believe they're constitutional?

Mr. Mark Potter: I do.

The Chair: Do you want to address that, Ms. Fobes?

Ms. Caroline Fobes (Deputy Executive Director and General Counsel, Department of Public Safety and Emergency Preparedness): Yes, just to reiterate, the legislation is sometimes made retroactive to prevent people with advance notice of it from avoiding it. It's intended, in fact. As Mr. Potter said, in this case the intended effect was to abolish the long-gun registry. So in this case, that's why the legislation is retroactive. Parliament does have the authority....

The Chair: You have one minute.

(....)

Mr. Andrew Saxton: Very quickly, going back to the long-gun

registry, Parliament did vote to end the long-gun registry. This particular change is simply to comply with the will of Parliament. Is that correct, Mr. Potter?

Mr. Mark Potter: That is correct.

Mr. Andrew Saxton: Thank you.

Thank you, Chair.

(...)

The meeting is adjourned.

May 26, 2015 FINA-82 29

...

**Page 11  
is not relevant  
est non pertinente**

2012, c. 6

## DIVISION 18

### ENDING THE LONG-GUN REGISTRY ACT

**230. Subsection 29(3) of the Ending the Long-gun Registry Act is replaced by the following:**

**(3) Sections 12 and 13 of the Library and Archives of Canada Act do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).**

**(4) The Access to Information Act, including sections 4, 30, 36, 37, 41, 42, 46, 67 and 67.1, does not apply, as of October 25, 2011, with respect to the records and copies referred to in subsections (1) and (2) or with respect to their destruction.**

**(5) The Privacy Act, including subsections 6(1) and (3) and sections 12, 29, 34, 35, 41, 42, 45 and 68, does not apply, as of October 25, 2011, with respect to personal information, as defined in section 3 of that Act, that is contained in the records and copies referred to in subsections (1) and (2) or with respect to the disposal of that information.**

**(6) For greater certainty, any request, complaint, investigation, application, judicial review, appeal or other proceeding under the Access to Information Act or the Privacy Act with respect to any act or thing referred to in subsection (4) or (5) that is in existence on or after October 25, 2011 is to be determined in accordance with that subsection.**

**(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.**

Non-application —  
Library and  
Archives of  
Canada Act

Non-application —  
Access to  
Information  
Act

Non-application —  
Privacy Act

For greater  
certainty

Non-application of  
other federal  
Acts

## SECTION 18

### LOI SUR L'ABOLITION DU REGISTRE DES ARMES D'EPAULE

2012, ch. 6

**230. Le paragraphe 29(3) de la Loi sur l'abolition du registre des armes d'épaule est remplacé par ce qui suit :**

**(3) Les articles 12 et 13 de la Loi sur la Bibliothèque et les Archives du Canada ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).**

**(4) La Loi sur l'accès à l'information — notamment les articles 4, 30, 36, 37, 41, 42, 46, 67 et 67.1 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement à leur destruction.**

**(5) La Loi sur la protection des renseignements personnels — notamment les paragraphes 6(1) et (3) et les articles 12, 29, 34, 35, 41, 42, 45 et 68 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux renseignements personnels, au sens de l'article 3 de cette loi, versés dans les registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement au retrait de ces renseignements.**

**(6) Il est entendu que toute procédure existante le 25 octobre 2011 ou après cette date — notamment toute demande, plainte, enquête, recours en révision, révision judiciaire ou appel — relative à tout acte ou toute chose mentionnés aux paragraphes (4) ou (5) et découlant de l'application de la Loi sur l'accès à l'information ou de la Loi sur la protection des renseignements personnels est déterminée en conformité avec l'un ou l'autre de ces paragraphes, selon le cas.**

**(7) En cas d'incompatibilité, les paragraphes (1) et (2) l'emportent sur toute autre loi fédérale et la destruction des registres, fichiers et copies qui sont mentionnés à ces paragraphes a lieu malgré toute obligation de conserver ceux-ci en vertu de cette autre loi.**

Non-application —  
Loi sur la  
Bibliothèque  
et les  
Archives du  
Canada

Non-application —  
Loi sur  
l'accès à  
l'information

Non-application —  
Loi sur la  
protection des  
renseignements  
personnels

Précision

Non-application  
de toute  
autre loi  
fédérale

**231. Section 30 of the Act and the heading before it are replaced by the following:**

**30. (1) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms or a chief firearms officer, or any person acting on behalf of or under the direction of any of them, with respect to the destruction, on or after April 5, 2012, of the records and copies referred to in subsections 29(1) and (2).**

No liability – destruction

**(2) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms, a chief firearms officer, a government institution or the head of a government institution, or any person acting on behalf of or under the direction of any of them, for any act or omission done, during the period beginning on October 25, 2011 and ending on the day on which this subsection comes into force, in purported compliance with the Access to Information Act or the Privacy Act in relation to any of the records and copies referred to in subsections 29(1) and (2).**

Definitions

**(3) In subsection (2), "government institution" and "head" have the same meanings as in section 3 of the Access to Information Act or the same meanings as in section 3 of the Privacy Act, as the case may be.**

**231. L'article 30 de la même loi et l'intertitre le précédent sont remplacés par ce qui suit :**

**30. (1) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale relativement à la destruction le 5 avril 2012 ou après cette date des registres, fichiers et copies mentionnés aux paragraphes 29(1) et (2).**

Immunité : destruction

**(2) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu, les institutions fédérales, les responsables d'institution fédérale et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale pour tout acte ou omission commis, pendant la période commençant le 25 octobre 2011 et se terminant le jour de l'entrée en vigueur du présent paragraphe, en vue de l'observation présumée de la Loi sur l'accès à l'information ou de la Loi sur la protection des renseignements personnels relativement à tout registre, fichier et copie mentionnés aux paragraphes 29(1) et (2).**

Immunité : renseignements personnels et accès à l'information

**(3) Au paragraphe (2), « institution fédérale » et « responsable d'institution fédérale » s'entendent au sens de l'article 3 de la Loi sur l'accès à l'information ou de l'article 3 de la Loi sur la protection des renseignements personnels, selon le cas.**



Service des poursuites  
pénales du Canada

Confidential

FOR INFORMATION

PPSC 2015-0374

s.23

## MEMORANDUM FOR THE ATTORNEY GENERAL

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s.23



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June 26, 2015



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

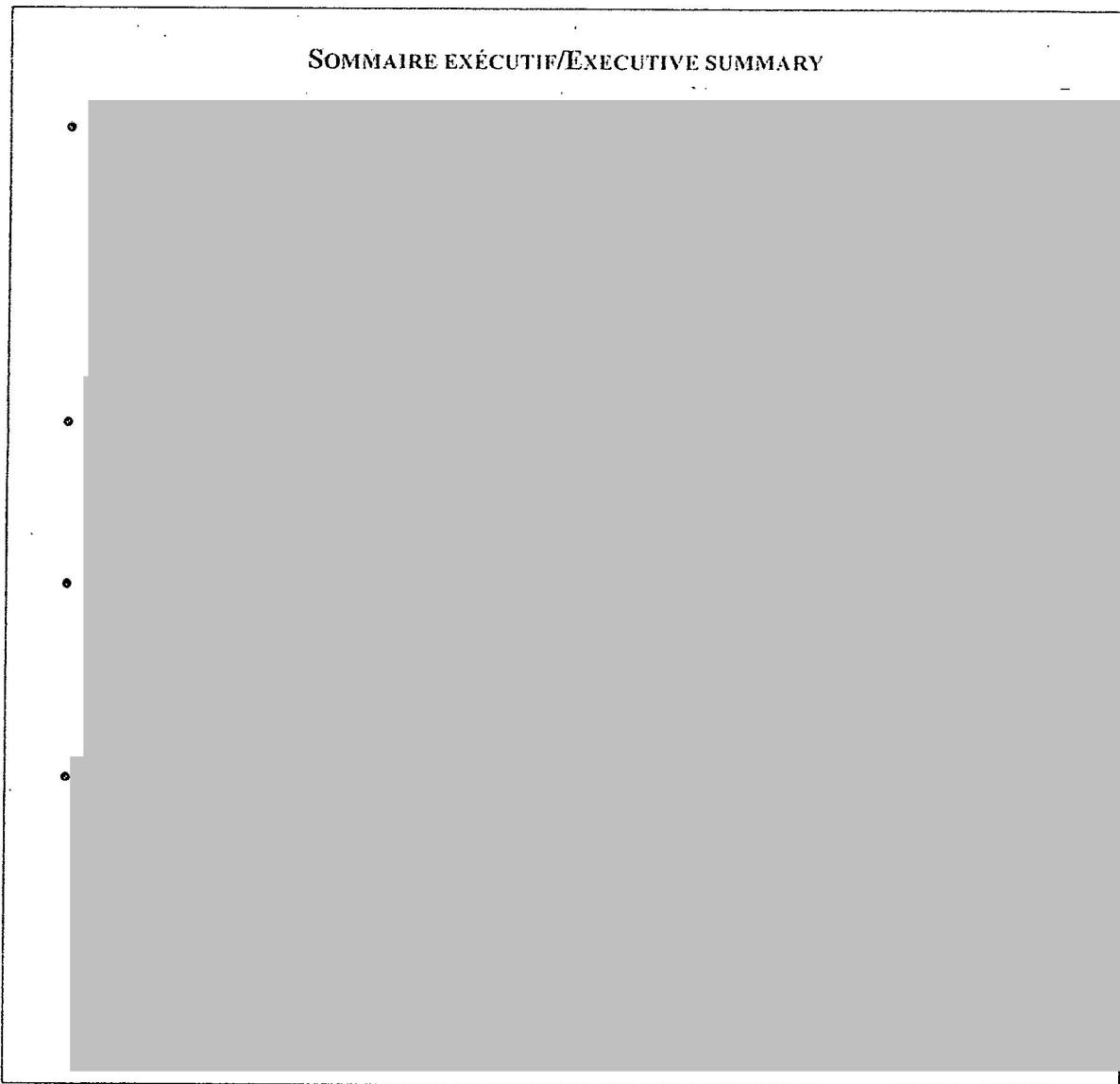
s.21(1)(b)

s.23

FOR INFORMATION  
NUMERO DU DOSSIER/FILE #: 2016-004372  
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE: Information Commissioner and Clennett's Constitutional Challenge of the  
*Ending the Long-gun Registry Act* and Related Judicial Review

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY



Soumis par (secteur)/Submitted by (Sector):

Public Safety, Defence and Immigration

Responsable dans l'équipe du SM/Lead in the DM Team:

Scott Nesbitt

s.69(1)(g) re (d)

Revue dans l'ULM par/Edited in the MLU by:

Matt Ignatowicz

Soumis au CM/Submitted to MO: 4 March 2016

000016



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

s.23

Protected B: Solicitor-Client Privilege  
FOR INFORMATION

2016-004372

## MEMORANDUM FOR THE MINISTER

Information Commissioner and Clennett's Constitutional Challenge of the *Ending the Long-gun Registry Act* and Related Judicial Review

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**Pages 18 to / à 19  
are withheld pursuant to sections  
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21(1)(a), 21(1)(b), 23  
of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 20**  
**is withheld pursuant to sections**  
**est retenue en vertu des articles**  
**21(1)(a), 21(1)(b), 23, 69(1)(g) re (d)**  
**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**Pages 21 to / à 41  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 42  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Department of Justice  
Canada

Ministère de la Justice  
Canada

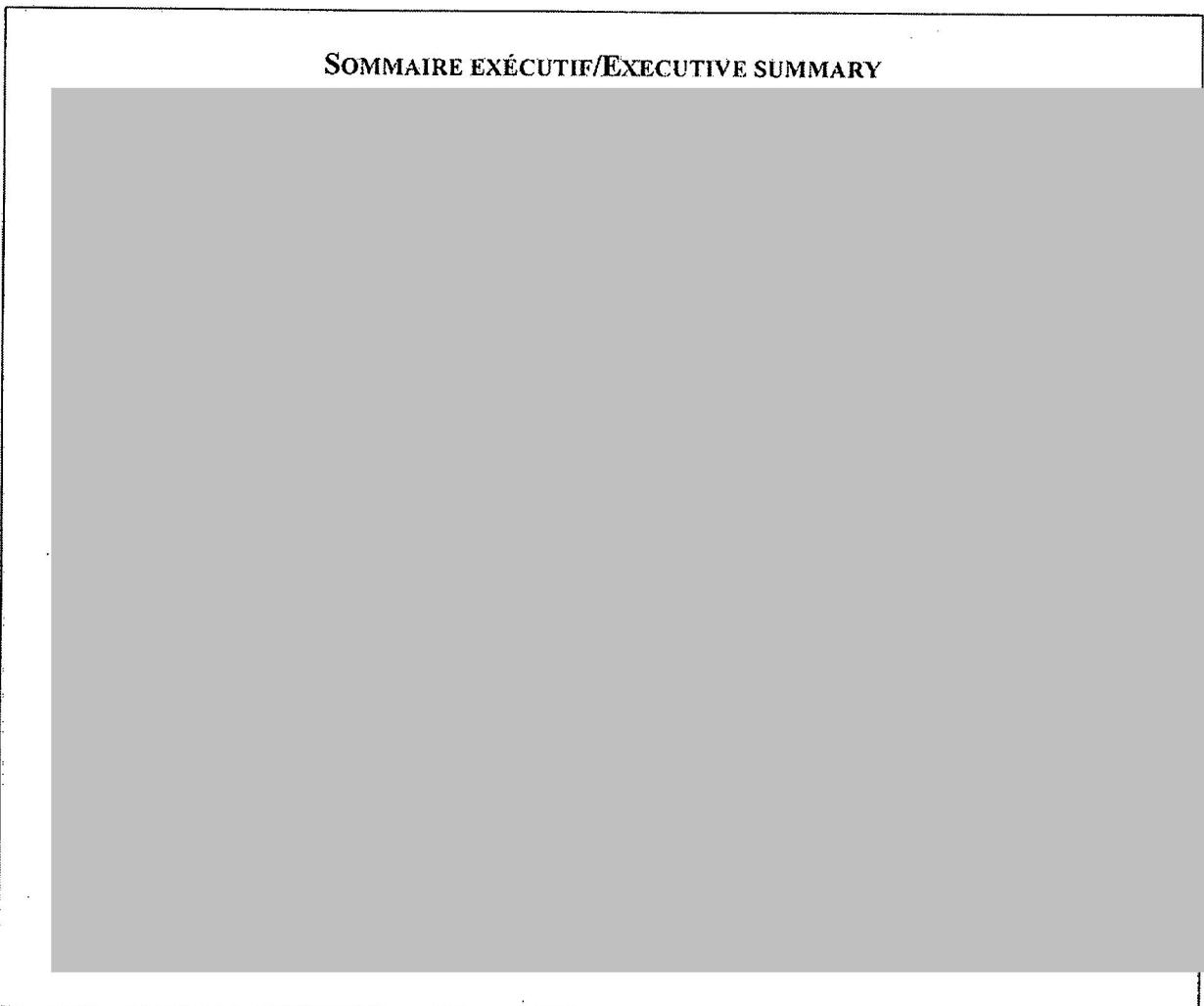
s.21(1)(a)  
s.21(1)(b)  
s.23

SCENARIO  
NUMERO DU DOSSIER/FILE #: 2016-006618  
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Secret

TITRE/TITLE:

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

s.69(1)(g) re (a)



Soumis par (secteur)/Submitted by (Sector): Public Safety, Defence and Immigration

Responsable dans l'équipe du SM/Lead in the DM Team: Caroline Leclerc

Revue dans l'ULM par/Edited in the MLU by: Sarah McCulloch

Soumis au CM/Submitted to MO: 15 April 2016



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

s.23

Secret  
SCENARIO

2016-006618

## MEMORANDUM FOR THE MINISTER

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Page 1 of 3

revs mlu 14 April 2015-006618-BN-[redacted]

**Page 45**  
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**est retenue en vertu des articles**  
**21(1)(a), 21(1)(b), 23**  
**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**ANNEXES**

s.69(1)(g) re (a)

Annex 1:

Annex 2:

Annex 3:

Annex 4:

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s.21(1)(a)

s.21(1)(b)

s.23

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**Pages 47 to / à 62  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



Department of Justice  
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s.21(1)(a)  
s.21(1)(b)

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FOR APPROVAL

2015-014129

## MEMORANDUM FOR THE MINISTER

**Request to meet from the Information Commissioner of Canada, Suzanne Legault**

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s.21(1)(a)

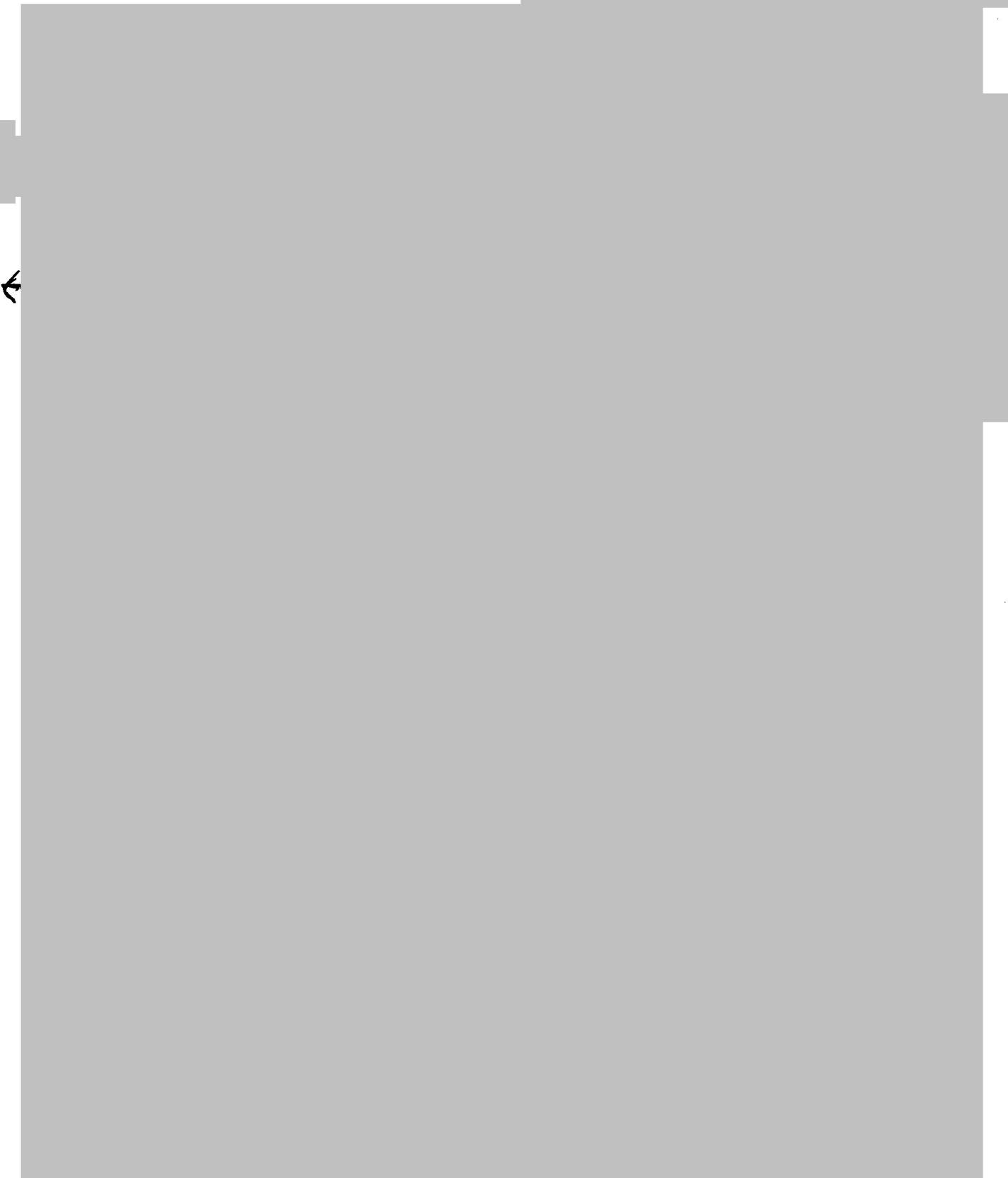
s.21(1)(b)

s.23



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Canada



Page 2 of 2  
File name



**ANNEXES [6]**

- Annex 1: Summary of the Information Commissioner's March 31 Special Report to Parliament on Modernization of the *Access to Information Act*.
- Annex 2: Copy of November 23, 2015 letter to The Honourable Jody Wilson-Raybould, P.C., M.P. from Suzanne Legault, Information Commissioner of Canada.
- Annex 3: Copy of the Information Commissioner's *Final Report of Facts and Findings and Recommendations* summarizing the long-gun registry complaint investigation.
- Annex 4: Summary of the Information Commissioner's 2014-15 Annual Report.
- Annex 5: Proposed response to incoming letter dated November 23, 2015 from Suzanne Legault, Information Commissioner of Canada.
- Annex 6: Proposed speaking points for meeting requested by Suzanne Legault, Information Commissioner of Canada.

**PREPARED BY**  
Megan Brady  
Counsel  
Public Law Sector  
613-954-1618

**I CONCUR.**

**I DO NOT CONCUR.**

**OTHER INSTRUCTIONS:**

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The Honourable Jody Wilson-Raybould

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Date

QUESTION PERIOD NOTE

Date:  
Classification:  
CCM#:

2015-12-09  
PROTECTED  
2015-013799

## Question Period Note

### FIREARMS

#### ISSUE:

The Government committed to reduce the number of handguns and assault rifles on Canadian streets.

#### PROPOSED RESPONSE:

- Our Government has committed to taking action to strengthen controls on handguns and assault rifles with a view to reducing the number of illegal firearms on our streets.
- In the upcoming weeks and months, I will be working with the Minister of Public Safety and Emergency Preparedness to repeal key elements of Bill C-42, including amendments to the *Criminal Code* that allowed the Governor in Council to prescribe a firearm as non-restricted or restricted, even when it meets the definition of a prohibited firearm in the *Criminal Code*.
- In the longer term, I will continue to work with the Minister of Public Safety and Emergency Preparedness to look at ways to strengthen the criminal justice system to address the criminal use of firearms and help make our streets safer.

If pressed about Quebec's request for long gun registry data:

- The Government will work with Quebec to determine how it may best support their efforts to create a provincial long-gun registry. The federal government will not create a new national long-gun registry.

## BACKGROUND:

Firearms is a responsibility shared between the Minister of Justice and the Minister of Public Safety and Emergency Preparedness. The Minister of Public Safety and Emergency Preparedness is responsible for the *Firearms Act* and its regulations. The RCMP is responsible for administering the *Firearms Act* and assesses every type of firearm imported into Canada to determine its classification according to the criteria in the *Criminal Code*.

The Minister of Justice is responsible for Part III of the *Criminal Code*, which includes the criteria defining the classification of firearms. The *Criminal Code* also sets out the firearms-related offences, penalties and forfeiture and prohibition order provisions.

The mandate letters to the Minister of Public Safety and Emergency Preparedness and the Minister of Justice directed them to take measures to reduce the number of handguns and assault weapons on the streets, including by repealing key elements of Bill C-42, the *Common Sense Firearms Licensing Act* (S.C. 2015, c.27), including: 1) an amendment that allows restricted and prohibited firearms to be transported with an Authorization to Transport that is part of the licence and can be used when transporting the firearm for a prescribed set of reasons (such as to a shooting range, or for repair); and 2) amendments to the *Criminal Code* that allow the Governor in Council to prescribe a firearm as non-restricted or restricted, even if the firearm meets the definitions in the *Criminal Code* of a restricted or prohibited firearm.

The Liberal Party stated that it would not "create a new national long-gun registry to replace the one that has been dismantled."

On December 3, 2015, the Quebec government tabled Bill 64, the *Firearms Registration Act*, which would require all firearms in Quebec, without exception, to be registered. In 2012, the *Ending the Long Gun Registry Act (ELRA)* repealed the requirement for non-restricted firearms to be registered and authorized the destruction of all non-restricted firearm registration data under section 29 of the Act. Quebec requested the registration data related to non-restricted firearms in that province from the federal government, but the request was denied. In light of this refusal, Quebec sought a declaration that section 29 was *ultra vires* (that is, beyond the powers of Parliament), and that Quebec has a right to obtain the data. On March 27, 2015, the Supreme Court of Canada ruled against Quebec and allowed for the destruction of this data. The Quebec records were deleted from the Canadian Firearms Information System (CFIS) following the SCC's dismissal of Quebec's challenge. However, because of a related on-going Access to Information Act request for the long-gun registry records made to the RCMP on March 27, 2012, the RCMP took steps to preserve that information outside of CFIS, but in a form not accessible to law enforcement.

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Approved by:

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Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

s.23

NUMÉRO DE DOSSIER/FILE #: 2015-014169  
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

TITRE/TITLE:

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY



Soumis par (secteur)/Submitted by (Sector): Public Safety, Defence and Immigration

Responsable dans l'équipe du SM/Lead in the DM Team: Scott Nesbitt

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: December 17, 2015



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)  
s.21(1)(b)  
s.23

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2015-014169

## MEMORANDUM FOR THE MINISTER

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Page 1 of 3  
revs mlu Dec 14 2015-014169 - BN - [Redacted]

**Page 72**  
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**21(1)(a), 21(1)(b), 23**  
**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**



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Department of Justice  
Canada  
RCMP Legal Services

Ministère de la Justice  
Canada  
Services juridiques de la GRC

- 1 -

MEMORANDUM / NOTE DE SERVICE

Released under the Access to Information Act / Divulgué en vertu de la Loi sur l'accès à l'information.	
Security classification / Niveau de sécurité	
<b>PROTECTED B : SOLICITOR-CLIENT PRIVILEGE</b>	
File number -- Numéro de dossier	[Redacted]
Date	April 22, 2015
Telephone / FAX -- Téléphone / Télécopieur	
613-843-4438 / 613-825-7489	

**TO / DEST:** William Pentney, Q.C., Deputy Minister

s.23

**VIA:** Elisabeth Eid, ADAG, PSDI

**FROM / ORIG:** RCMP Legal Services

**SUBJECT / OBJET:** [Redacted]  
[Large redacted area below]

**Pages 75 to / à 94  
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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 95 to / à 97  
are not relevant  
sont non pertinentes**



ANNEX 6  
Unclassified  
2015 -014129

**Talking Points**  
**Meeting proposed by the Information Commissioner by**  
**letter dated November 23, 2015**

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**Modernization of the Access to *Information Act***

- **Thank you for your detailed and comprehensive report on modernizing the *Access to Information Act*, with eighty five recommendations. I will be reviewing your recommended reforms very carefully.**
- **The Government is committed to making government information more accessible and open, including from a broader range of government institutions.**
- **I look forward to working collaboratively with you and the President of the Treasury Board to ensure that access to information rights are enhanced.**

**Constitutional challenge to the *Ending the Long Gun Registry Act***

- **Given that the matter is before the courts, I am restricted in what I can discuss.**
- **Decisions with respect to this file will be taken in consultation with the Minister of Public Safety.**

## Invitation to celebrate the history of access to information rights collaboratively

- **Thank you for highlighting these important initiatives.**
- **We look forward to receiving more information about the upcoming events to celebrate access to information rights in Canada.**

**PREPARED BY**

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Department of Justice  
Canada

Ministère de la Justice  
Canada

## Fiche d'approbation Approval Slip

*À remplir par le secteur / To be completed by sector*

DOSSIER/FILE # 2015-014129

Objet / Subject: Request to meet from the Information Commissioner of Canada, Suzanne Legault

Préparée par /  
Prepared by: Megan Brady (954-1618)

Cote de sécurité /  
Security level: Protected B / Solicitor Client  
Privilege / Limited distribution during embargo  
Numéro de téléphone /  
Telephone number: 957-0225

Personnel de soutien /  
Administrative personnel: Mélanie Bastien

Nombre de pièces jointes /  
Number of attachments: 6

Date limite à l'ULM /  
Due at MLU: \_\_\_\_\_

Soumise pour approbation à  
Sector approvals as required

Initiales Initials	Année Year	Mois Month	Journée Day
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Mala Khanna, Director, General Counsel, CIPL / Directrice, avocate Générale, CDIPRP

KK \_\_\_\_\_

Laurie Wright, ADM, Public Law Sector / SMA, Secteur du droit public

LW 2015 12 09

William F. Pentney, Deputy Minister of Justice and Deputy Attorney General of Canada / Sous-ministre de la Justice et sous-procureur général du Canada

\_\_\_\_\_

Équipe du SM / DM-Team

Approbation/signature/examen du ministre demandé pour le :  
Minister's signature/approval/review requested by: \_\_\_\_\_

Remarques / remarks: \_\_\_\_\_

*À remplir par l'ULM / To be completed by MLU*

À la demande de /Requested by:/ Veuillez faire parvenir à :/Please forward to:

Revue interne / Seen by: \_\_\_\_\_  
Rédaction par/ Edited by: \_\_\_\_\_

Reçue / received: \_\_\_\_\_

Received in MLU: \_\_\_\_\_



Department of Justice  
Canada

Ministère de la Justice  
Canada

FILE #: 2015-014129

SECURITY CLASSIFICATION: PROTECTED B

**Request to meet from the Information Commissioner of Canada**

**EXECUTIVE SUMMARY**

- On November 23, 2015, the Information Commissioner wrote to you to express her interest in meeting to discuss modernization of the *Access to Information Act* ("ATIA") and her constitutional challenge to the recent amendments to the *Ending the Long-gun Registry Act*. A copy of this letter is included at Annex 2.
- The Information Commissioner also tabled her 2014-2015 Annual Report in Parliament on December 8, 2015.
- You will be working with the President of the Treasury Board to support his review of the ATIA.
- The Minister of Public Safety is leading the Government's response to the Information Commissioner's constitutional challenge to recent amendments to the *Ending the Long-Gun Registry Act*.
- A meeting with the Information Commissioner would promote collaboration between the Department of Justice and the Information Commissioner, a key stakeholder in access to information reform initiatives. As the matter is currently before the court, we would recommend not discussing the Commissioner's constitutional challenge to the *Ending the Long-gun Registry Act* at this time.
- A draft response letter welcoming the proposed meeting is appended at Annex 5.

Submitted by Public Law Sector: December 8, 2015

Lead in the DM Team: \_\_\_\_\_

Edited in the MLU by: \_\_\_\_\_

Soumis au CM/Submitted to MO:



Protected B / Limited distribution during embargo  
FOR APPROVAL

2015-014129

## MEMORANDUM FOR THE MINISTER

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### **Request to meet from the Information Commissioner of Canada, Suzanne Legault**

#### **ISSUE**

This memorandum provides background information on the Information Commissioner's priorities as they relate to the mandate of the Department of Justice and seeks approval of an affirmative response to the Information Commissioner's request to meet to discuss modernization of the *Access to Information Act* in her letter to you of November 23, 2015.

#### **BACKGROUND**

The *Access to Information Act* ("ATIA") came into force in 1983. Despite significant pressure to modernize the ATIA over the years, the Act has not been substantially amended since its adoption in 1982. The Information Commissioner has identified the challenges posed by digital records, the evolution of the administration of government and the emergence of the open government movement as key developments necessitating reform of the ATIA.

The Information Commissioner is an independent Agent of Parliament who oversees the application of the ATIA by receiving and investigating complaints related to the federal government's access to information practices. She provides reports with non-binding recommendations to government institutions and, where she finds a denial of access to information, she may initiate proceedings to ask the Federal Court to order the Government to disclose records.

In a Special Report to Parliament tabled March 31, 2015, the Information Commissioner concluded that the ATIA no longer strikes the right balance between the public's right to know and government's need to protect information. She put forward eighty-five recommended amendments. Annex 1 is a list of the recommendations in the report.

As Attorney General, you provide legal advice on the interpretation of the ATIA to most government institutions subject to the Act and you represent them in Court when their decisions are judicially reviewed. You are also specifically designated by Order-in-Council as the Minister responsible for particular provisions with respect to the scope and application of the Act. The President of the Treasury Board is responsible for the administration of the Act, including the publication of Guidelines.

On November 23, 2015, the Information Commissioner wrote to you to express her interest in meeting. She would like to discuss reform of the ATIA, her constitutional challenge to recent

amendments to the *Ending the Long-gun Registry Act* ("ELRA"), and how to collaborate with the Department of Justice to renew Canada's access to information system and celebrate upcoming milestones. She also expresses her sincere hope that the Department of Justice will collaborate with her office to celebrate World Press Freedom Day events in 2016 along with the 250<sup>th</sup> anniversary of Sweden's *Freedom of the Press Act*. A copy of this letter is included at Annex 2.

#### *Review of the ATIA*

~~Your mandate letter confirms the government's commitment to openness and transparency,~~ noting that the government and its information should be open by default. You will be working with the President of the Treasury Board to support his review of the ATIA to ensure: that Canadians have easier access to information; that the Information Commissioner is empowered to order government information to be released; and, that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.

#### *Constitutional challenge to the Ending the Long-gun Registry Act*

The *Ending the Long-gun Registry Act* ("ELRA") eliminated the requirement to register certain firearms and mandated the destruction of existing records within the Canadian Firearms Registry (the "Registry"). It came into force in April 2012, after an access request had been made for a copy of the database. In May 2015, the Information Commissioner submitted a Special Report to Parliament finding evidence that the RCMP had destroyed records with the knowledge that these records were subject to the right of access. Your predecessor referred the matter to the Ontario Provincial Police for investigation. Annex 3 is a copy of the Information Commissioner's *Final Report of Facts and Findings and Recommendations*. She also launched a judicial review in Federal Court alleging that Public Safety's response to the access request was incomplete.

Amendments to the *ELRA* adopted in June 2015 retroactively exempted Registry records from the application of the ATIA. This cut short the Federal Court's oversight of the application made by the Commissioner in May 2015 and the related OPP investigation. The Information Commissioner views these amendments as a very significant regression in access to information and a threat to the rule of law and freedom of expression. Accordingly, she applied in June 2015 to the Ontario Superior Court seeking a declaration that these amendments are unconstitutional.

On December 3, 2015 the Attorney General of Canada was granted an order by the Ontario Superior Court allowing it three months to obtain instructions on how to proceed.

#### *Information Commissioner's 2014-2015 Annual Report*

The Information Commissioner tabled her 2014-15 Annual Report in Parliament on December 8, 2015. The report is structured to support the legislative amendments to the *Access to Information Act* that she recommended in her March 2015 Special Report to Parliament, linking concrete issues from recent complaint investigations with recommended reforms. A summary of the Commissioner's 2014-15 Annual Report and the report itself is included at Annex 4.

## **CONSIDERATIONS**

*Review of the ATIA*

Officials will provide further briefings and advice as  
this initiative moves forward.

*Constitutional challenge to the Ending the Long-gun Registry Act*

The Minister of Public Safety is the lead on the Information Commissioner's constitutional challenge to the recent amendments to the ELRA.

It would be unusual to  
comment on active litigation, particularly in these circumstances.

**RECOMMENDATION**

A meeting with the Information Commissioner would further the goal of promoting collaboration between the Department of Justice and the Information Commissioner, a key stakeholder in access to information reform initiatives. A draft response letter welcoming the proposed meeting is appended at Annex 5 along with proposed talking points at Annex 6. We would not recommend discussing the Commissioner's constitutional challenge to the amendments to the ELRA at this time.

**ANNEXES [6]**

- Annex 1: List of the Information Commissioner's March 2015 Special Report to Parliament on Modernization of the *Access to Information Act*.
- Annex 2: Copy of November 23, 2015 letter to The Honourable Jody Wilson-Raybould, P.C., M.P. from Suzanne Legault, Information Commissioner of Canada.
- Annex 3: Copy of the Information Commissioner's *Appendix 1: Final Report of Facts and Findings and Recommendations* summarizing the long-gun registry complaint investigation.
- Annex 4: Information Commissioner's 2014-15 Annual Report.
- Annex 5: Proposed response to incoming letter dated November 23, 2015 from Suzanne Legault, Information Commissioner of Canada.
- Annex 6: Proposed speaking points for meeting requested by Suzanne Legault, Information Commissioner of Canada.

s.21(1)(a)

s.21(1)(b)

s.23

s.69(1)(g) re (a)

s.69(1)(g) re (c)

**PREPARED BY**  
Megán Brady  
Counsel  
Public Law Sector  
613-954-1618

**I CONCUR.**  
 **I DO NOT CONCUR.**  
 **OTHER INSTRUCTIONS:**

---

The Honourable Jody Wilson-Raybould

Date



Commissaire  
à l'information  
du Canada

Information  
Commissioner  
of Canada

Gatineau, Canada  
K1A 1H3

NOV 23 2015

**The Honourable Jody Wilson-Raybould, P.C., M.P.**

Minister of Justice and  
Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

Dear Minister:

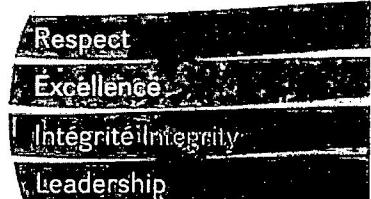
I would like to congratulate you on your appointment to the position of Minister of Justice and Attorney General of Canada.

I am pleased that the current government views the need for greater accountability and transparency as a priority. I believe that Canadians are demanding and expecting a well-functioning access to information system that is fully integrated in the government's vision for open government.

Unfortunately, Canadians have seen their rights erode as a result of an outdated *Access to Information Act* (Act) which is in immediate need of reform. I have tabled last March 2015 a report to Parliament that makes 85 recommendations to modernize the Act. Please find a copy of the report enclosed.

The erosion is also the result of the adoption of amendments to existing laws or new legislation that have limited the application of the Act. Of great significance recently was the adoption of Bill C-59, the *Economic Action Plan 2015 Act, No.1* which has amended the *Ending the Long-gun Registry Act*. These amendments retroactively oust the application of the *Access to Information Act*. In my view, these amendments are unconstitutional and contravene the rule of law. The matter is currently before the Superior Court of Ontario.

I am also pleased to see that some of the key priorities in your mandate letter relate to enhancing the openness of government, reviewing the *Access to Information Act* and ending ongoing litigation that is not consistent with your government's commitments or the Charter. All these priorities will serve to strengthen the access to information system.



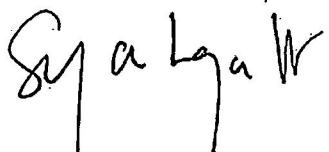
Page 2

UNESCO just designated September 28 as the "International Day for the Universal Access to Information" and chose access to information as the theme for the World Press Freedom Day events in 2016. Next year will also mark the 250<sup>th</sup> anniversary of Sweden's *Freedom of the Press Act*. This act is considered to be the first freedom of information legislation in the world. Events will take place all around the world, including here in Ottawa. They represent a unique opportunity to celebrate access to information rights in Canada. It is my sincere hope that my office and your department can collaborate to celebrate these events together.

I believe that a strong commitment at the highest echelon of government for the principles embedded in the *Access to Information Act*, including collaboration with my Office, will contribute significantly towards greater transparency and accountability.

I would welcome a meeting with you to discuss the current challenges posed by the Act and how my office and I can collaborate with your department to move forward on a renewed and efficient commitment to Canada's access to information system.

Sincerely,



Suzanne Legault  
Information Commissioner of Canada

c.c.: William F. Pentney  
Deputy Minister of Justice

Deputy Minister's Office / Cabinet du Sous-Ministre  
Routing Slip / Feuille de contrôle

Letter Date / Date de Lettre:

Dep't #: 2015-013528

Author/  
Auteur: Suzanne Legault  
Information Commissioner of Canada  
Office of the Information Commissioner of  
Canada  
112 Kent Street  
Ottawa ON K1A 1H3

Doc Type / Type de doc:

Due Date / Date d'échéance:

Assigned To / Assigné à:

PLS-ADM  
INFORMATION MO might be requesting advice

Asgn. Date /

Date assigné:

11/25/2015

BF Date /

Date rappel:

Ret. Date /

Date de retour:

Synopsis / Précis: (INCOMING) LETTER TO THE MINISTER OF JUSTICE FROM INFORMATION COMMISSIONER OF CANADA REQUESTING ACCESS TO INFORMATION ACT REFORM

REQUEST BRIEFING NOTE	[ ]	DEMANDER NOTE DE SYNTHÈSE
YOUR RECOMMENDATION	[ ]	VOTRE RECOMMANDATION
ACTION AT YOUR DISCRETION	[ ]	DONNER SUITE À VOTRE DISCRÉTION
DRAFT RESPONSE FOR DM SIGNATURE	[ ]	FAIRE UN PROJET DE RÉPONSE POUR LA SIGNATURE DU SM
ACTION	[ ]	ACTION
DIRECT REPLY WITH COPY TO DMO	[ ]	POUR RÉPONSE ET COPIE AU BSM
FOR REVISION (UPDATE)	[ ]	POUR RÉVISION (METTRE À JOUR)
TO ATTEND IF INTERESTED (PLEASE INFORM DMO OF DECISION)	[ ]	PARTICIPATION SI VOUS ÊTES INTÉRESSÉ (S.V.P. AVISEZ LE BSM DE LA DÉCISION)
FOR CORRECTIONS	[ ]	POUR CORRECTIONS
FOR INFORMATION	[ ]	POUR INFORMATION

Additional Comments / Remarques additionnelles:

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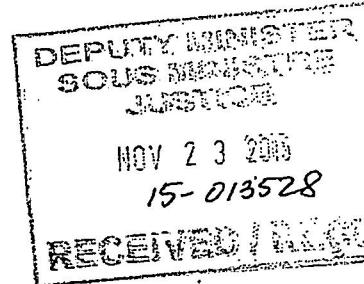
File Away / Classer:



Commissaire  
à l'information  
du Canada

Information  
Commissioner  
of Canada

Gatineau, Canada  
K1A 1H3



NOV 23 2015

The Honourable Jody Wilson-Raybould, P.C., M.P.

Minister of Justice and  
Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

Dear Minister:

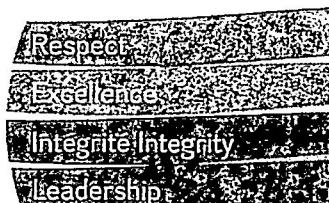
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I am also pleased to see that some of the key priorities in your mandate letter relate to enhancing the openness of government, reviewing the *Access to Information Act* and ending ongoing litigation that is not consistent with your government's commitments or the Charter. All these priorities will serve to strengthen the access to information system.



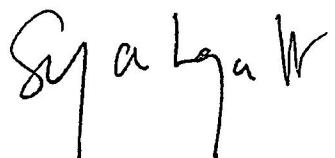
Page 2

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I believe that a strong commitment at the highest echelon of government for the principles embedded in the *Access to Information Act*, including collaboration with my Office, will contribute significantly towards greater transparency and accountability.

I would welcome a meeting with you to discuss the current challenges posed by the Act and how my office and I can collaborate with your department to move forward on a renewed and efficient commitment to Canada's access to information system.

Sincerely,



Suzanne Legault  
Information Commissioner of Canada

c.c.: William F. Pentney  
Deputy Minister of Justice

**Pages 111 to / à 131  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 132  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 133 to / à 142  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

Court File No. T-785-15

**FEDERAL COURT**

BETWEEN:

**THE INFORMATION COMMISSIONER OF CANADA**

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondent

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**RESPONDENT'S MOTION RECORD**

**(Motion For An Order Preventing The Destruction  
Of The Records In Issue In This Application)**

---

June 17, 2015

William F. Pentney, Q.C.  
Deputy Attorney General of Canada  
Per: **Gregory S. Tzemenakis**  
Department of Justice  
Civil Litigation Section  
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Tel: (613) 670-6338  
Fax: (613) 954-1920

Solicitors for the Respondent

TO: Richard G. Dearden  
Gowling Lafleur Henderson L.L.P.  
Barristers & Solicitors  
2600 - 160 Elgin Street  
Ottawa, Ontario K1P 1C3

Tel: (613) 786-0135  
Fax: (613) 788-3430

Counsel for the Applicant

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<u>Tab</u>	<u>Document</u>
1	Affidavit of Jennifer Walsh, affirmed June 15, 2015
2	Respondent's Memorandum of Argument, dated June 17, 2015

Court File No. T-785-15

**FEDERAL COURT**

BETWEEN:

**THE INFORMATION COMMISSIONER OF CANADA**

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondent

**AFFIDAVIT OF JENNIFER WALSH**

I, Jennifer Walsh, of the City of Ottawa, in the Province of Ontario, AFFIRM  
THAT:

1. I am a System Analyst\Programmer with the Application Development Branch, RCMP Chief Information Officer (CIO) Sector. As such, I have personal knowledge of the facts herein affirmed.

*The Canadian Firearms Information System*

2. Firearms-related information required under the *Firearms Act* and associated regulations is stored in a fully integrated, customized automated information system called the Canadian Firearms Information System (“CFIS”). It currently stores approximately 1.3 billion rows of data across 547 system tables.

*Record deletion in October 2012*

3. On April 5, 2012, the *Ending the Long-gun Registry Act* came into force. The *Act* required the destruction of all records relating to the registration of non-restricted firearms held under the Commissioner of Firearms or the Chief Firearms Officers, as soon as feasible.
4. The RCMP Canadian Firearms Program ("CFP") developed an Implementation Plan which would delete the non-restricted registration records that were held within CFIS. Due to the technical complexity of CFIS, an algorithm which ensured the targeted data would be destroyed, while retaining the integrity of all other data within CFIS, took months to create. The deletion was executed in 2 phases. The first phase was to expire (make inactive) the non-restricted registration records. The second phase was to delete the records permanently.
5. On May 20, 2012, 5.5 million non-restricted firearm registration records were set to an "expired" status within CFIS. These records did not include those related to residents of Quebec.
6. Between October 26 and 31, 2012, 5.5 million non-restricted firearm registration records were permanently deleted from CFIS. This deletion exercise included any backup copies of the data which existed.

*The data backups relevant to this application*

7. Following the decision of the Supreme Court in the Constitutional challenge by Quebec regarding the *Ending the Long-gun Registry Act*, on April 3, 2015, the RCMP expired 1.6 million non-restricted firearm registration records for residents of Quebec. Between April 10 and April 12, 2015, the RCMP permanently destroyed the 1.6 million Quebec non-restricted firearm registration records in CFIS.
8. Prior to the expiration of the Quebec registration records for non-restricted firearms, the RCMP CFP took two steps to retain the records.
9. First, it made a complete copy of CFIS as it existed on April 3, 2015. This copy includes not only the Oracle database with the data, but also the architecture which allows for system functionality and linkages between the data. This complete copy of CFIS is the authentic copy of the complete record and would be the source from which the RCMP CFP would extract any additional data if ordered by the Court.
10. The complete copy of CFIS is not directly readable data, and would require the creation of a user access interface, within its current technical environment, to view or review the data it contains. It is 472 GB in size. This copy of CFIS relies not only on the Oracle data base which retains the CFIS data, but also on the CFIS business logic (the Powerbuilder / Weblogic code) and the CFIS architecture (the 547 system tables) which are critical to “de-normalize” the data in order to create linkages and allow for proper interpretation of the data.

11. The complete copy of CFIS resides securely on a virtual server within the RCMP Data Centre, which is a climate-controlled secure facility with 24-hour maintenance within RCMP headquarters, and which has the infrastructure and technical personnel to support such technical hardware. Only the CFIS Data Base Administrator currently has access to the complete copy of CFIS. The RCMP has taken considerable measures to ensure the data is securely maintained and controlled.
12. Creating a functional version of this copy of CFIS, outside the current RCMP technical environment, and transferring this copy of CFIS to the Court, is estimated to take months of effort due to the technical complexity of the CFIS architecture. It would require computer technicians to install an enterprise class server with at least 4 GB of RAM, 750 GB of "SAN" space, 100 GB of local space, 100 MB local space (on a desktop to run the CFIS front end application) and an Oracle Database licence in a secure and climate-controlled environment; the transportation of the data on information storage devices; the installation of the data and its architecture on this new server environment; testing to ensure the transfer was successful and did not corrupt or otherwise damage the data or architecture; and, ongoing maintenance of the new server environment. Greater risk of corruption or other damage to the records would exist in transferring this copy of CFIS to the Court Registry than in maintaining it in its current format and location.

13. Second, the RCMP created a copy of the Quebec registration records for non-restricted firearms, selecting any data that may have been associated to the 64 fields identified by the Information Commissioner as relevant to registration records. This data, in a delimited text file, along with an estimated 500,000 images, is 1 terabyte in volume and resides on an external hard drive stored in a secure location to which only one individual has access.
14. The delimited text file renders each record into a continuous row of data elements with no linkages to any of the 500,000 images (if any is associated to the registration record). Due to the volume of the records (1.6 million) as well as the amount of data for each record, this data is not practically readable and would require significant programming efforts to render it useable and reliable. It is estimated that the programming would take a minimum of 22 days and would result in a static output format, such as a spreadsheet, which significantly differs from that of CFIS.
15. Both the Oracle database with functional architecture and the external hard drive described above are securely stored with very limited access and there is no risk of inadvertent destruction of the data. Neither the Oracle database nor the external hard drive is available to law enforcement and Chief Firearms Officers.

16. Should verification of the retention be required, the RCMP would arrange access  
to the backup CFIS database within its native environment.

Affirmed before me at )  
the City of Ottawa, )  
in the Province of Ontario )  
on June 15, 2015 )

JENNIFER WALSH

Nicole Walsh  
Commissioner for Taking Affidavits

Nicole Leigh Lackey-Ruwald, a Commissioner, etc.,  
Province of Ontario, for the Government of Canada,  
Department of Justice.  
Expires December 3, 2016.

Court File No. T-785-15

FEDERAL COURT

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

**RESPONDENT'S MEMORANDUM OF ARGUMENT**

**Overview**

1. This motion is predicated on the passage of Bill C-59 as currently worded. The Applicant seeks to prevent the destruction of long-gun registry records under the control of the Commissioner of Firearms and to have them transferred to the Federal Court Registry or to have them preserved. The motion should be dismissed.
  
2. The balance of convenience lies in favour of implementing the will of Parliament. The decision to dismantle the long-gun registry and destroy the data that it contains is a policy choice that Parliament was constitutionally entitled to make. Section 29 of the *Ending the Long-gun Registry Act (ELGRA)* is a lawful exercise of Parliament's criminal law legislative power under the Constitution.

3. The clearly expressed will of Parliament in the *ELGRA* is to destroy records relating to the registration of non-restricted firearms under the control of the Commissioner of Firearms as soon as feasible. Division 18 of Bill C-59 reconfirms the will of Parliament and removes the use of other statutory vehicles, such as the *Access to Information Act* (*ATIA*), that would otherwise frustrate its implementation.
4. In the alternative, an order preserving, as opposed to transferring, the records at issue is appropriate.

## PART I - FACTS

### 1. Parliament is Supreme

5. On April 5, 2012, the *ELGRA*<sup>1</sup> came into force. The *Act* required the destruction of all records relating to the registration of non-restricted firearms under the Commissioner of Firearms or the Chief Firearms Officers, as soon as feasible.<sup>2</sup> For the purposes of this motion, the Commissioner of Firearms is the Commissioner of the Royal Canadian Mounted Police (RCMP).

6. Section 29 of the *ELGRA* read as follows:<sup>3</sup>

#### TRANSITIONAL PROVISIONS

29. (1) The Commissioner of Firearms shall ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control.

(2) Each chief firearms officer shall ensure the destruction as soon as feasible of all records under their control related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under their control.

#### DISPOSITIONS TRANSITOIRES

29. (1) Le commissaire aux armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui se trouvent dans le Registre canadien des armes à feu, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

(2) Chaque contrôleur des armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui relèvent de lui, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

<sup>1</sup> *Ending the Long-gun Registry Act*, S.C. 2012, c. 6.

<sup>2</sup> Affidavit of Jennifer Walsh, Respondent's Motion Record ("RMR"), Tab 1, para. 2

<sup>3</sup> *Ending the Long-gun Registry Act*, S.C. 2012, c. 6, s. 29(1).

(3) Sections 12 and 13 of the *Library and Archives of Canada Act* and subsections 6(1) and (3) of the *Privacy Act* do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

(3) Les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* et les paragraphes 6(1) et (3) de la *Loi sur la protection des renseignements personnels* ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

7. The matter of the registration and data retention provisions under the *Firearms Act* is a matter of public safety and in relation to the subject of criminal law. According to the Supreme Court of Canada, legislation repealing portions of that scheme, including a provision that addresses what will happen to the data collected, is characterized in the same way. Section 29 of the *ELGRA* relates to public safety, as did the long-gun registration scheme being repealed by the *ELGRA*.<sup>4</sup>
8. The decision to create and then dismantle the long-gun registry, including provisions describing what will happen to the data collected under the repealed scheme is a policy choice that Parliament was, and is, constitutionally entitled to make. According to the Supreme Court, the power to repeal criminal law provisions is logically wide enough to give Parliament jurisdiction to destroy the data collected for the purposes of those provisions. Section 29 of the *ELGRA* is a lawful exercise of Parliament's criminal law legislative power under the Constitution.<sup>5</sup>

<sup>4</sup> *Reference re Firearms*, 2000 SCC 31, para. 4, Respondent's Book of Authorities, Tab 12; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 41, Respondent's Book of Authorities, Tab 11.

<sup>5</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 45, Respondent's Book of Authorities, Tab 11.

9. On May 7, 2015, Bill C-59 was tabled in Parliament. Division 18, as currently worded, would amend section 29 of the *ELGRA* as follows:<sup>6</sup>

230. Subsection 29(3) of the Ending the Long-gun Registry Act is replaced by the following:

(3) Sections 12 and 13 of the Library and Archives of Canada Act do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

(4) The Access to Information Act, including sections 4, 30, 36, 37, 41, 42, 46, 67 and 67.1, does not apply, as of October 25, 2011, with respect to the records and copies referred to in subsections (1) and (2) or with respect to their destruction.

(5) The Privacy Act, including subsections 6(1) and (3) and sections 12, 29, 34, 35, 41, 42, 45 and 68, does not apply, as of October 25, 2011, with respect to personal information, as defined in section 3 of that Act, that is contained in the records and copies referred to in subsections (1) and (2) or with respect to the disposal of that information.

230. Le paragraphe 29(3) de la Loi sur l'abolition du registre des armes d'épaule est remplacé par ce qui suit :

(3) Les articles 12 et 13 de la Loi sur la Bibliothèque et les Archives du Canada ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

(4) La Loi sur l'accès à l'information — notamment les articles 4, 30, 36, 37, 41, 42, 46, 67 et 67.1 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement à leur destruction.

(5) La Loi sur la protection des renseignements personnels — notamment les paragraphes 6(1) et (3) et les articles 12, 29, 34, 35, 41, 42, 45 et 68 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux renseignements personnels, au sens de l'article 3 de cette loi, versés dans les registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement au retrait de ces renseignements.

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<sup>6</sup> Bill C-59, *An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures*, 2<sup>nd</sup> Sess, 41st Parl, 2015, Division 18 (as passed by the House of Commons 15 June 2015).

(6) For greater certainty, any request, complaint, investigation, application, judicial review, appeal or other proceeding under the Access to Information Act or the Privacy Act with respect to any act or thing referred to in subsection (4) or (5) that is in existence on or after October 25, 2011 is to be determined in accordance with that subsection.

(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.

231. Section 30 of the Act and the heading before it are replaced by the following:

30. (1) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms or a chief firearms officer, or any person acting on behalf of or under the direction of any of them, with respect to the destruction, on or after April 5, 2012, of the records and copies referred to in subsections 29(1) and (2).

(6) Il est entendu que toute procédure existante le 25 octobre 2011 ou après cette date — notamment toute demande, plainte, enquête, recours en révision, révision judiciaire ou appel — relative à tout acte ou toute chose mentionnés aux paragraphes (4) ou (5) et découlant de l'application de la Loi sur l'accès à l'information ou de la Loi sur la protection des renseignements personnels est déterminée en conformité avec l'un ou l'autre de ces paragraphes, selon le cas.

(7) En cas d'incompatibilité, les paragraphes (1) et (2) l'emportent sur toute autre loi fédérale et la destruction des registres, fichiers et copies qui sont mentionnés à ces paragraphes a lieu malgré toute obligation de conserver ceux-ci en vertu de cette autre loi.

231. L'article 30 de la même loi et l'intertitre le précédent sont remplacés par ce qui suit :

30. (1) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficiant de l'immunité en matière administrative, civile ou pénale relativement à la destruction le 5 avril 2012 ou après cette date des registres, fichiers et copies mentionnés aux paragraphes 29(1) et (2).

(2) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms, a chief firearms officer, a government institution or the head of a government institution, or any person acting on behalf of or under the direction of any of them, for any act or omission done, during the period beginning on October 25, 2011 and ending on the day on which this subsection comes into force, in purported compliance with the Access to Information Act or the Privacy Act in relation to any of the records and copies referred to in subsections 29(1) and (2).

(3) In subsection (2), "government institution" and "head" have the same meanings as in section 3 of the Access to Information Act or the same meanings as in section 3 of the Privacy Act, as the case may be.

(2) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu, les institutions fédérales, les responsables d'institution fédérale et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale pour tout acte ou omission commis, pendant la période commençant le 25 octobre 2011 et se terminant le jour de l'entrée en vigueur du présent paragraphe, en vue de l'observation présumée de la Loi sur l'accès à l'information ou de la Loi sur la protection des renseignements personnels relativement à tout registre, fichier et copie mentionnés aux paragraphes 29(1) et (2).

(3) Au paragraphe (2), « institution fédérale » et « responsable d'institution fédérale » s'entendent au sens de l'article 3 de la Loi sur l'accès à l'information ou de l'article 3 de la Loi sur la protection des renseignements personnels, selon le cas.

10. The purpose of these amendments is to ensure that the will of Parliament, as expressed in the *ELGRA*, is fulfilled and is not frustrated by other statutory vehicles, such as the *ATIA*.<sup>7</sup>

<sup>7</sup> Senate, Standing Committee on National Finance, *Report on the Subject-Matter of Parts 1, 2 and Divisions 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 18 And 20 of Part 3 of Bill C-59, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on April 21, 2015 and Other Measures* (June 2015), pp. 26-27 (Chair: Joseph A. Day), Respondent's Book of Authorities, Tab 1.

**2. Assurances have been provided and remain in effect**

11. On Feb 3, 2015, Counsel for the Commissioner of the RCMP wrote to the Applicant stating:

“The RCMP, on behalf of the Commissioner, agrees with the clarifications requested. A copy of the final CFIS back-up will be maintained for the sole purpose of permitting the OIC to complete their investigation and any other related court proceedings, in any eventuality that may result from a decision by the Supreme Court, including but not limited to the requirement to destroy.”<sup>8</sup>

12. By letter dated February 20, 2015, the RCMP, on behalf of the RCMP Commissioner, reconfirmed the assurances provided to preserve the remaining records:

“The RCMP Commissioner has already provided his assurances that if for any reason the *Ending the Long Gun Registry Act* or the impending Supreme Court of Canada decision would necessitate that the Commissioner of Firearms destroy the non-restricted firearms records relating to the province of Quebec, that he will, prior to destruction, require the CIO sector of the RCMP hold for RCMP ATIP a copy of the final backup of the CFIS to permit the OIC to complete their investigation and for any related court requirements.”<sup>9</sup>

13. The Applicant acknowledged the assurances provided in her letter dated March 26, 2015.

In her Summary of the Timeline of Events at Appendix B, she confirmed that assurances had been provided:

“By email dated February 3, 2015, Mr. Tzemenakis provided the OIC with assurances on behalf of Commissioner Paulson that the RCMP would preserve the records identified by the OIC as being responsive to the request.”<sup>10</sup>

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<sup>8</sup> Exhibit J to Affidavit of Neil O'Brian, Applicant's Motion Record ("AMR"), pg. 86.

<sup>9</sup> Exhibit K to Affidavit of Neil O'Brian, AMR, pg. 104.

<sup>10</sup> Exhibit GG to Affidavit of Neil O'Brian, AMR, pg. 188.

14. By letter dated April 30, 2015, the Minister of Public Safety reiterated again that assurances had already been provided:

«Il semblerait que la GRC a répondu à votre troisième recommandation en préservant une copie des fichiers pertinents, afin de vous aider dans votre enquête qui n'est pas disponible aux services de l'application de la loi ni aux contrôleurs des armes à feu.»<sup>11</sup>

**3. Two sets of records have been preserved**

15. As explained below, the RCMP has maintained two expired back-up copies of the records at issue in this Application. These copies are not accessible to front-line police personnel. The first is a complete copy of the Canadian Firearms Information System (CFIS) as of April 3, 2015, which contains records related to non-restricted firearms belonging to residents of Quebec and prohibited firearms and restricted firearms for the entire country. This is in essence a complete copy of CFIS as of April 3, 2015, which contains significantly more information and data than the records at issue. The second back-up is an external hard drive of the data which exists in the 64 fields and the estimated 500,000 images that the Applicant believes are responsive to the underlying Application, without the remainder of the information that could be found in CFIS as of April 3, 2015.

**4. The Canadian Firearms Information System**

16. Firearms-related information required under the *Firearms Act* and associated regulations is stored in a fully integrated, customized automated information system called CFIS. It currently stores approximately 1.3 billion rows of data across 547 system tables.<sup>12</sup>

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<sup>11</sup> Exhibit II to Affidavit of Neil O'Brian, AMR, pg. 226.

<sup>12</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 1.

##### **5. The destruction of long-gun registry records in October 2012**

17. Pursuant to the *ELGRA*, the RCMP Canadian Firearms Program (“CFP”) developed an Implementation Plan which would delete the non-restricted registration records that were held within CFIS. Due to the technical complexity of CFIS, an algorithm which ensured the targeted data would be destroyed, while retaining the integrity of all other data within CFIS, took months to create. The deletion was executed in 2 phases. The first phase was to expire (make inactive) the non-restricted registration records. The second phase was to delete the records permanently.<sup>13</sup>
18. On May 20, 2012, 5.5 million non-restricted firearm registration records were set to an “expired” status within CFIS. These records did not include those related to residents of Quebec.<sup>14</sup>
19. Between October 26 and 31, 2012, 5.5 million non-restricted firearm registration records were then permanently deleted from CFIS. This deletion exercise included any backup copies of the data which existed.<sup>15</sup>

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<sup>13</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, paras. 2 and 3.

<sup>14</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 4.

<sup>15</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 5.

## 6. The preservation of long-gun registry records relevant to the Application

20. Following the decision of the Supreme Court in the Constitutional challenge by Quebec regarding the *ELGRA*, on April 3, 2015, the RCMP expired 1.6 million non-restricted firearm registration records for residents of Quebec. Between April 10 and April 12, 2015, the RCMP permanently destroyed the 1.6 million Quebec non-restricted firearm registration records in CFIS.<sup>16</sup>
21. Prior to the expiration of the Quebec registration records for non-restricted firearms, the RCMP CFP took two steps to retain the records.<sup>17</sup>
22. First, it made a complete copy of CFIS as it existed on April 3, 2015. This copy includes not only the Oracle database with the data, but also the architecture which allows for system functionality and linkages between the data. This complete copy of CFIS is the authentic copy of the complete record and would be the source from which the RCMP CFP would extract any additional data if ordered by the Court.<sup>18</sup>

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<sup>16</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 6.

<sup>17</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 7.

<sup>18</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 8.

23. The complete copy of CFIS is not directly readable data, and would require the creation of a user access interface, within its current technical environment, to view or review the data it contains. It is 472 GB in size. This copy of CFIS relies not only on the Oracle data base which retains the CFIS data, but also on the CFIS business logic (the Powerbuilder / Weblogic code) and the CFIS architecture (the 547 system tables) which are critical to "de-normalize" the data in order to create linkages and allow for proper interpretation of the data.<sup>19</sup>
24. Only the CFIS Data Base Administrator currently has access to the complete copy of CFIS. The RCMP has taken considerable measures to ensure the data is securely maintained and controlled. The complete copy of CFIS resides securely on a virtual server within the RCMP Data Centre, which is a climate-controlled secure facility with 24-hour maintenance within RCMP headquarters, and which has the infrastructure and technical personnel to support such technical hardware.<sup>20</sup>
25. Creating a functional version of this copy of CFIS, outside the current RCMP technical environment, and transferring this copy of CFIS to the Court, is estimated to take months of effort due to the technical complexity of the CFIS architecture. It would require computer technicians to install an enterprise class server with at least 4 GB of RAM, 750 GB of "SAN" space, 100 GB of local space, 100 MB local space (on a desktop to run the CFIS front end application) and an Oracle Database licence in a secure and climate-controlled environment; the transportation of the data on information storage devices; the

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<sup>19</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 9.

<sup>20</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 10.

installation of the data and its architecture on this new server environment; testing to ensure the transfer was successful and did not corrupt or otherwise damage the data or architecture; and, ongoing maintenance of the new server environment. Greater risk of corruption or other damage to the records would exist in transferring this copy of CFIS to the Court Registry than in maintaining it in its current format and location.<sup>21</sup>

26. Second, the RCMP created a copy of the Quebec registration records for non-restricted firearms, selecting any data that may have been associated to the 64 fields identified by the Information Commissioner as relevant to registration records. This data, in a delimited text file, along with an estimated 500,000 images, is 1 terabyte in volume and resides on an external hard drive stored in a secure location to which only one individual has access.<sup>22</sup>
27. The delimited text file renders each record into a continuous row of data elements with no linkages to any of the approximately 500,000 images (if any is associated to the registration record). Due to the volume of the records (1.6 million) as well as the amount of data for each record, this data is not practically readable and would require significant programming efforts to render it useable and reliable. It is estimated that the programming would take a minimum of 22 days and would result in a static output format, such as a spreadsheet, which significantly differs from that of CFIS.<sup>23</sup>

<sup>21</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 11.

<sup>22</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 12.

<sup>23</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 13.

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28. Both the Oracle database with functional architecture and the external hard drive described above are securely stored with very limited access and there is no risk of inadvertent destruction of the data. Neither the Oracle database nor the external hard drive is available to law enforcement and Chief Firearms Officers.<sup>24</sup>
29. Should verification of the retention be required, the RCMP would arrange access to the backup CFIS database within its native environment.<sup>25</sup>

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<sup>24</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 14.

<sup>25</sup> Affidavit of Jennifer Walsh, RMR, Tab 1, para. 15.

## PART II – ISSUES

30. There are two issues to be decided by the Court:

- (1) Whether the Applicant has satisfied all three branches of the *RJR-MacDonald* test for an interlocutory injunction?
- (2) If yes, what is the appropriate remedy?

## PART III – ARGUMENT

### THE APPLICANT HAS NOT SATISFIED THE TEST FOR AN INTERIM INJUNCTION

#### 1. Current Situation

31. There is no dispute that the current assurances provided by the Minister of Public Safety and the Commissioner of the RCMP, summarized above at paragraphs 11 to 14, remain in force and are being respected. These assurances were provided as early as February 2015 and have been maintained. These assurances demonstrate that the actions of the RCMP and the Respondent Minister following the commencement of the Applicant's investigation were in keeping with the current state of the law, meaning that the records were kept to allow for the resolution of the investigation and this Application. Otherwise the records at issue could legally have been destroyed following the release of the Supreme Court of Canada's decision in *Quebec (Attorney General) v. Canada (Attorney General)*.<sup>26</sup>

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<sup>26</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, Respondent's Book of Authorities, Tab 11.

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32. The reference by the Applicant to past alleged breaches of assurances is, with respect, irrelevant as they are more properly related to the merits of the Application, if at all. It is the position of the RCMP that they destroyed certain long-gun registry records in October of 2012, in accordance with the will of Parliament as expressed in the *ELGRA*, believing in good faith that they had complied with their obligations under the *ATIA* by maintaining a responsive copy of the records for the requestor:

“The RCMP ATIP personnel understood these comments from the OIC as being agreement that A-2012-00183 was responsive to A-2012-0085. In addition, this made sense as request A-2012-00183 was broader than request A-2012-0085. Any information released for request A-2012-00183 would necessarily include releasable/ non-exempt information responsive to request A-2012-0085.”<sup>27</sup>

## **2. The Request for an Injunction**

33. This motion is predicated on the passage of Bill C-59 which is intended to conclusively implement the will of Parliament by destroying any remaining long-gun registry records in CFIS relating to residents from Quebec.

### **a. The Test for an Injunction**

34. An applicant seeking an interlocutory injunction must meet the tri-partite test set out by the Supreme Court of Canada in *RJR-MacDonald*:

- (a) Is there a serious question to be tried?
- (b) Will the applicant suffer irreparable harm if the interlocutory injunction is not granted?

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<sup>27</sup> Exhibit K to Affidavit of Neil O'Brian, AMR, pg. 102, third paragraph from bottom, “The RCMP ATIP personnel....”

(c) Does the balance of convenience favour the granting of the interlocutory injunction?<sup>28</sup>

35. The test is conjunctive, meaning that all three branches must be met before the Applicant is entitled to relief.<sup>29</sup> However, the Courts have also clarified that the three branches of the test are not watertight compartments, and that the strength of one can compensate for the weakness of another. Ultimately, the Applicant must show that it is in the interests of justice to grant the remedy sought.<sup>30</sup>

**b. No Position as to whether there is a serious question**

36. Generally, the threshold for making out a serious question is a low one, in that the moving party must show that the underlying application is neither vexatious nor frivolous. The Respondent takes no position on the issue of whether the Applicant has raised at least one issue in the underlying Application that is serious.<sup>31</sup>

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<sup>28</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 332-333 [*RJR-MacDonald*], Applicant's Book of Authorities, Tab 3.

<sup>29</sup> *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214, para. 3, Respondent's Book of Authorities, Tab 3.

<sup>30</sup> *Yaiguaje v Chevron Corporation*, 2014 ONCA 40, para. 19, Respondent's Book of Authorities, Tab 14.

<sup>31</sup> *RJR-MacDonald* at 335, 337, Applicant's Book of Authorities, Tab 15; see also *Glooscap Heritage Society v Canada (Minister of National Revenue)*, 2012 FCA 255, para. 25 [*Glooscap*], Respondent's Book of Authorities, Tab 5.

**c. No position as to whether there is irreparable harm**

37. The issue of whether the Applicant will suffer irreparable harm relates to the nature of the harm, not its magnitude. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Furthermore, the harm claimed must be demonstrated to be clear and not speculative.<sup>32</sup>

38. It is not enough for a party to show that irreparable harm *may arguably result* if the injunction is not granted. Allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking an injunction to show that irreparable harm *will result*.<sup>33</sup> To do so, specific and concrete evidence of irreparable harm must be adduced:

To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight.<sup>34</sup>

39. The Respondent takes no position on the issue of whether there is irreparable harm.

<sup>32</sup> *RJR-MacDonald* at 340-341.

<sup>33</sup> *International Longshore and Warehouse Union, Canada v. Canada*, 2008 FCA 3, paras 22-25, Respondent's Book of Authorities, Tab 7.

<sup>34</sup> *Glooscap*, para. 31, Respondent's Book of Authorities, Tab 5.

**d. The Balance of Convenience favours the Respondent**

40. The third part of the *RJR-Macdonald* test requires the Court to consider whether the balance of convenience favours the Applicant or the Respondent. The factors to be considered include the nature of the relief sought, the harm the parties allege they will suffer, the nature of the legislation under attack, and where the public interest lies.<sup>35</sup>

41. In assessing the balance of convenience, a court must proceed on the basis that a law, in this case the Bill to be enacted,<sup>36</sup> is directed to the public good and serves a valid public purpose.<sup>37</sup> Bill C-59 is presumed to be valid and constitutional once passed and to have been passed in the public interest for the public good. As observed by the Supreme Court in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically –elected legislatures and are generally passed for the common good... It seems axiomatic that the granting of interlocutory injunctive relief ... is susceptible temporarily to frustrate the pursuit of the common good.<sup>38</sup>

<sup>35</sup> *RJR-MacDonald* at 342-347.

<sup>36</sup> This is an exceptional situation. Courts have seen fit to refrain from pronouncing upon, or otherwise taking account of, a bill that has not yet completed its way through the Parliamentary process: *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552 (CA), Respondent's Book of Authorities, Tab 13.

<sup>37</sup> *Harper v. Canada (Attorney General)*, 2000 SCC 57, para. 9, Respondent's Book of Authorities, Tab 6; see also *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, para. 56 [*Metropolitan Stores*], Respondent's Book of Authorities, Tab 10.

<sup>38</sup> *Metropolitan Stores Ltd.*, para. 56, Respondent's Book of Authorities, Tab 10.

42. A party may “tip the scales of convenience in its favour” by demonstrating a compelling public interest in granting or refusing the relief sought.<sup>39</sup> When the stated purpose of a contested piece of legislation, of a regulation or of an activity is to promote the public interest, the question of whether it actually does so is irrelevant; promotion of the public interest must be assumed.<sup>40</sup> In *RJR-MacDonald*, the Supreme Court stated:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. **The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.** Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.<sup>41</sup> (Emphasis added)

43. In *Harper v. Canada (Attorney General)*, McLachlin C.J. emphasized that:

The assumption of the public interest in enforcing the law weighs heavily in the balance. **Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.**<sup>42</sup> (Emphasis added)

<sup>39</sup> *RJR-MacDonald*, paras 71 and 85.

<sup>40</sup> *RJR-MacDonald*, para. 85; see also *Laperrière v D&A MacLeod Company Ltd*, 2010 FCA 84, para. 12, Respondent's Book of Authorities, Tab 8.

<sup>41</sup> *RJR-MacDonald*, para 76 [emphasis added].

<sup>42</sup> *Harper v. Canada (Attorney General)*, 2000 SCC 57, para. 9, Respondent's Book of Authorities, Tab 6.

44. In the circumstances, the balance of convenience and the public interest favours the Respondent. In March of 2015, the Supreme Court ruled that section 29 of the *ELGRA* relates to public safety, as did the long-gun registration scheme being repealed by the *ELGRA*.<sup>43</sup>
45. Division 18 of Bill C-59 amends section 29 of the *ELGRA*. Division 18 is a matter of public safety, a policy choice that Parliament is constitutionally entitled to make, and must be presumed to be a lawful exercise of Parliament's criminal law legislative power under the Constitution.
46. The clearly expressed will of Parliament in the *ELGRA* is to destroy records related to the long-gun registry as soon as feasible. Division 18 of Bill C-59 reconfirms the will of Parliament and removes the use of other statutory vehicles, such as the *ATIA*, that would otherwise frustrate that objective.

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<sup>43</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 41, Respondent's Book of Authorities, Tab 11.

47. Parliament has seen fit to specifically address the provisions of the *ATIA* twice in Division 18. In subsection 231(4), Parliament has indicated that the *ATIA* does not apply to the records and copies in subsection 29(1) and (2) of the *ELGRA*. In subsection 231(7), Parliament has indicated that these provisions take precedence over “any other Act of Parliament”, including the *ATIA*. These subsections, as currently worded:

(4) The *Access to Information Act*, including sections 4, 30, 36, 37, 41, 42, 46, 67 and 67.1, does not apply, as of October 25, 2011, with respect to the records and copies referred to in subsections (1) and (2) or with respect to their destruction.

(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.

48. The decision to dismantle the long-gun registry, including provisions describing what will happen to the data collected under the repealed scheme is a policy choice that Parliament was, and is, constitutionally entitled to make.<sup>44</sup>

49. Contrary to paragraph 96 of the Applicant’s Memorandum of Fact and Law, the decision of *Quebec (Procureur général) c. Canada (Procureur général)* is distinguishable. The underlying application in that matter raised issues relating to the division of powers and constitutional authority of Parliament. The underlying Application in this matter is the right of access by one individual to records that Parliament, through its elected representatives, has determined should be destroyed.

<sup>44</sup> *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 3, Respondent’s Book of Authorities, Tab 11.

50. Finally, the Applicant's position at paragraph 98 of her Memorandum of Fact and Law is wholly inconsistent. The Applicant's motion is premised on the passage of Bill C-59. She is incorrect at law when she argues that the complainant's right of access and the court's review take precedence over the *ELGRA*. Division 18 of Bill C-59 reconfirms the will of Parliament. If passed in its current form, Parliament will have expressly stated that the provisions of *ELGRA* take precedence.<sup>45</sup>
51. For these reasons, the Respondent submits that the balance of convenience favours dismissing this motion.

**IN THE ALTERNATIVE, THE APPROPRIATE REMEDY IS PRESERVATION NOT TRANSFER**

52. In the alternative, should the Court determine that the Applicant has met the tri-partite test set out above, the question to be resolved by the Court on this motion would be whether either of the Applicant's alternative remedies is appropriate in the circumstances.

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<sup>45</sup> *Bogoch Seed Company v. C.P.R. and C.N.R.*, [1963] S.C.R. 247 at 256, Respondent's Book of Authorities, Tab 2.

53. In crafting an appropriate remedy, the Court should consider:

- a. what would achieve the goals of the motion without imposing a disproportionate or impractical burden on either of the parties;<sup>46</sup>
- b. the practical implications of transferring data that is of no utility to the Court in the underlying Application; and
- c. whether the Applicant has met the onus of requiring a transfer of records to the Court.

### **1. Transfer is Impractical**

54. On a practical level, the transfer of the records, being the complete copy of the CFIS database and its architecture to the Court Registry, involves disproportionate technical demands on the Court and the Respondent. It additionally poses a greater risk to the records than leaving them securely stored in their current environment.

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<sup>46</sup> *Enbridge Pipelines Inc. v. Jane Doe*, 2014 ONSC 4716, para. 18, Respondent's Book of Authorities, Tab 4; *Makhija v. Canada (Attorney General)*, 2010 FC 141, para. 85, Respondent's Book of Authorities, Tab 9.

55. In this instance, and as described more thoroughly above, the first remedy requested by the Applicant would impose a significant burden on both the federal Crown and the Court, in terms of the practical realities of creating the facility in which the data might be stored by the latter and transferring the data and its architecture. The data which the Applicant seeks to protect is currently protected against inadvertent destruction by a robust set of technical and maintenance measures in its present environment, thereby realizing the goal the Applicant states she is seeking by this motion.
56. The transfer of the external hard drive bearing the textual data and associated but unlinked images would be technically feasible, but would serve no practical purpose, as it is in an unreadable format. Rendering the data on the external hard drive readable would create new records rather than preserve a copy of the original records, as required by the *ATIA* and as requested by the Applicant in her motion.
57. The external hard drive containing simply the string of data from each record cannot reasonably be considered to be the "record at issue". The authentic copy of the data is that from which additional data would be extracted, should the Applicant be successful on her Application.

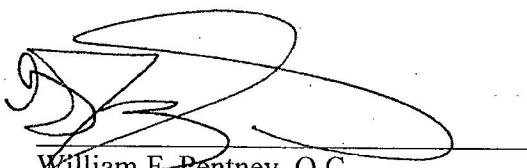
## **2. Preservation Order is Sufficient**

58. There is no evidence that an order for preservation by this Court would not be respected and there is no real risk of inadvertent destruction if the Court were to grant such an order.

#### PART IV – ORDER REQUESTED

59. The Respondent requests that this motion be dismissed, with costs.
60. In the alternative, the Respondent requests that the Court order, consistent with the assurances provided to date, that the records at issue in this Application be preserved in their current form and location until the final disposition of this Application or the Court orders otherwise.

June 17, 2015



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## PART V – AUTHORITIES

*Ending the Long-gun Registry Act, S.C. 2012, c. 6.*

*Bill C-59, An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures, 2nd Sess, 41st Parl, 2015, Division 18.*

*Senate, Standing Committee on National Finance, Report on the Subject-Matter of Parts 1, 2 and Divisions 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 18 And 20 of Part 3 of Bill C-59, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on April 21, 2015 and Other Measures (June 2015).*

*Bogoch Seed Company v. C.P.R. and C.N.R., [1963] S.C.R. 247.*

*Canada (Public Works and Government Services) v Musqueam First Nation, 2008 FCA 214.*

*Enbridge Pipelines Inc. v. Jane Doe, 2014 ONSC 4716.*

*Glooscap Heritage Society v Canada (Minister of National Revenue), 2012 FCA 255.*

*Harper v. Canada (Attorney General), 2000 SCC 57.*

*International Longshore and Warehouse Union, Canada v. Canada, 2008 FCA 3.*

*Laperrière v D&A MacLeod Company Ltd, 2010 FCA 84.*

*Makhija v. Canada (Attorney General), 2010 FC 141.*

*Manitoba (A.G.) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110.*

*Quebec (Attorney General) v. Canada (Attorney General), 2015 SCC 14.*

*Reference re Firearms, 2000 SCC 31.*

*RJR-MacDonald Inc v Canada (Attorney General), [1994] 1 S.C.R. 311.*

*Sethi v. Canada (Minister of Employment and Immigration), [1988] 2 F.C. 552 (CA)*

*Yaiguaje v Chevron Corporation, 2014 ONCA 40.*

Court File No. T-785-15

**FEDERAL COURT**

BETWEEN:

**THE INFORMATION COMMISSIONER OF CANADA**

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondent

**RESPONDENT'S MEMORANDUM OF ARGUMENT**

**Overview**

1. This motion is predicated on the passage of Bill C-59 as currently worded. The Applicant seeks to prevent the destruction of long-gun registry records under the control of the Royal Canadian Mounted Police (RCMP) and to have them transferred to the Federal Court Registry or to have them preserved. The motion should be dismissed.
  
2. The balance of convenience lies in favour of implementing the will of Parliament. The decision to dismantle the long-gun registry and destroy the data that it contains is a policy choice that Parliament was constitutionally entitled to make. Section 29 of the *Ending the Long-gun Registry Act (ELGRA)* is a lawful exercise of Parliament's criminal law legislative power under the Constitution.

3. The clearly expressed will of Parliament in the *ELGRA* is to destroy records relating to the registration of non-restricted firearms under the control of the RCMP as soon as feasible. Division 18 of Bill C-59 reconfirms the will of Parliament and removes the use of other statutory vehicles, such as the *Access to Information Act (ATIA)*, to frustrate its implementation.
4. In the alternative, an order preserving, as opposed to transferring, the records at issue is appropriate.

## PART I - FACTS

### 1. Parliament is Supreme

5. On April 5, 2012, the *ELGRA*<sup>1</sup> came into force. The *Act* required the destruction of all records relating to the registration of non-restricted firearms under the Commissioner of Firearms or the Chief Firearms Officers, as soon as feasible.<sup>2</sup> For the purposes of this motion, the Commissioner of Firearms is the Commissioner of the RCMP.

6. Section 29 of the *ELGRA* read as follows:<sup>3</sup>

#### TRANSITIONAL PROVISIONS

29. (1) The Commissioner of Firearms shall ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control.

(2) Each chief firearms officer shall ensure the destruction as soon as feasible of all records under their control related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under their control.

(3) Sections 12 and 13 of the *Library and Archives of Canada Act* and subsections 6(1) and (3) of the *Privacy Act* do not

#### DISPOSITIONS TRANSITOIRES

29. (1) Le commissaire aux armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui se trouvent dans le Registre canadien des armes à feu, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

(2) Chaque contrôleur des armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui relèvent de lui, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

(3) Les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* et les paragraphes 6(1) et (3) de la *Loi sur la*

<sup>1</sup> Cite to ELGRA

<sup>2</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 2

<sup>3</sup> Cite to ELGRA

apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

*protection des renseignements personnels*  
ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

7. The matter of the registration and data retention provisions under the *Firearms Act* is a matter of public safety and in relation to the subject of criminal law. According to the Supreme Court of Canada, legislation repealing portions of that scheme, including a provision that addresses what will happen to the data collected, is characterized in the same way. Section 29 of the *ELGRA* relates to public safety, as did the long-gun registration scheme being repealed by the *ELGRA*.<sup>4</sup>
8. The decision to create and then dismantle the long-gun registry, including provisions describing what will happen to the data collected under the repealed scheme is a policy choice that Parliament was, and is, constitutionally entitled to make. According to the Supreme Court, the power to repeal criminal law provisions is logically wide enough to give Parliament jurisdiction to destroy the data collected for the purposes of those provisions. Section 29 of the *ELGRA* is a lawful exercise of Parliament's criminal law legislative power under the Constitution.<sup>5</sup>

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<sup>4</sup> Reference re Firearms – 2000 SCC 31, para XX; also *Quebec AG v Canada AG*, 2015 SCC 14 at 41

<sup>5</sup> Quebec AG SCC case at para 45

9. On April 20, 2015, Bill C-59 was tabled in Parliament. Division 18, as currently worded, would amend section 29 of the *ELGRA* as follows:<sup>6</sup>

230. Subsection 29(3) of the Ending the Long-gun Registry Act is replaced by the following:

(3) Sections 12 and 13 of the Library and Archives of Canada Act do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

(4) The Access to Information Act, including sections 4, 30, 36, 37, 41, 42, 46, 67 and 67.1, does not apply, as of October 25, 2011, with respect to the records and copies referred to in subsections (1) and (2) or with respect to their destruction.

(5) The Privacy Act, including subsections 6(1) and (3) and sections 12, 29, 34, 35, 41, 42, 45 and 68, does not apply, as of October 25, 2011, with respect to personal information, as defined in section 3 of that Act, that is contained in the records and copies referred to in subsections (1) and (2) or with respect to the disposal of that information.

(6) For greater certainty, any request, complaint, investigation, application, judicial review, appeal

230. Le paragraphe 29(3) de la Loi sur l'abolition du registre des armes d'épaule est remplacé par ce qui suit :

(3) Les articles 12 et 13 de la Loi sur la Bibliothèque et les Archives du Canada ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

(4) La Loi sur l'accès à l'information — notamment les articles 4, 30, 36, 37, 41, 42, 46, 67 et 67.1 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement à leur destruction.

(5) La Loi sur la protection des renseignements personnels — notamment les paragraphes 6(1) et (3) et les articles 12, 29, 34, 35, 41, 42, 45 et 68 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux renseignements personnels, au sens de l'article 3 de cette loi, versés dans les registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement au retrait de ces renseignements.

(6) Il est entendu que toute procédure existante le 25 octobre 2011 ou après cette date —

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<sup>6</sup> Cite to Division 18 of Bill C-59

or other proceeding under the Access to Information Act or the Privacy Act with respect to any act or thing referred to in subsection (4) or (5) that is in existence on or after October 25, 2011 is to be determined in accordance with that subsection.

(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.

231. Section 30 of the Act and the heading before it are replaced by the following:

30. (1) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms or a chief firearms officer, or any person acting on behalf of or under the direction of any of them, with respect to the destruction, on or after April 5, 2012, of the records and copies referred to in subsections 29(1) and (2).

(2) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms, a chief

notamment toute demande, plainte, enquête, recours en révision, révision judiciaire ou appel — relative à tout acte ou toute chose mentionnés aux paragraphes (4) ou (5) et découlant de l'application de la Loi sur l'accès à l'information ou de la Loi sur la protection des renseignements personnels est déterminée en conformité avec l'un ou l'autre de ces paragraphes, selon le cas.

(7) En cas d'incompatibilité, les paragraphes (1) et (2) l'emportent sur toute autre loi fédérale et la destruction des registres, fichiers et copies qui sont mentionnés à ces paragraphes a lieu malgré toute obligation de conserver ceux-ci en vertu de cette autre loi.

231. L'article 30 de la même loi et l'intertitre le précédent sont remplacés par ce qui suit :

30. (1) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale relativement à la destruction le 5 avril 2012 ou après cette date des registres, fichiers et copies mentionnés aux paragraphes 29(1) et (2).

(2) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu, les institutions fédérales, les

firearms officer, a government institution or the head of a government institution, or any person acting on behalf of or under the direction of any of them, for any act or omission done, during the period beginning on October 25, 2011 and ending on the day on which this subsection comes into force, in purported compliance with the Access to Information Act or the Privacy Act in relation to any of the records and copies referred to in subsections 29(1) and (2).

(3) In subsection (2), “government institution” and “head” have the same meanings as in section 3 of the Access to Information Act or the same meanings as in section 3 of the Privacy Act, as the case may be.

responsables d’institution fédérale et les personnes qui agissent pour le compte de l’un ou l’autre d’entre eux ou sous leur autorité bénéficient de l’immunité en matière administrative, civile ou pénale pour tout acte ou omission commis, pendant la période commençant le 25 octobre 2011 et se terminant le jour de l’entrée en vigueur du présent paragraphe, en vue de l’observation présumée de la Loi sur l’accès à l’information ou de la Loi sur la protection des renseignements personnels relativement à tout registre, fichier et copie mentionnés aux paragraphes 29(1) et (2).

(3) Au paragraphe (2), « institution fédérale » et « responsable d’institution fédérale » s’entendent au sens de l’article 3 de la Loi sur l’accès à l’information ou de l’article 3 de la Loi sur la protection des renseignements personnels, selon le cas.

10. The purpose of these amendments is to ensure that the will of Parliament, as expressed in the *ELGRA*, is fulfilled and is not frustrated by other statutory vehicles, such as the *ATIA*.<sup>7</sup>

**(Clients - Do we need more? Perhaps to explain section 231)**

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<sup>7</sup> Twenty-second Report of the Standing Senate Committee on National Finance, June 2015, pp. 26-27 [NTD: can this be in evidence without an affidavit?]

**2. Assurances have been provided and remain in effect**

11. On Feb 3, 2015, Counsel for the Commissioner of the RCMP wrote to the Applicant stating:

“The RCMP, on behalf of the Commissioner, agrees with the clarifications requested. A copy of the final CFIS back-up will be maintained for the sole purpose of permitting the OIC to complete their investigation and any other related court proceedings, in any eventuality that may result from a decision by the Supreme Court, including but not limited to the requirement to destroy.”<sup>8</sup>

12. By letter dated February 20, 2015, the RCMP, on behalf of the RCMP Commissioner, reconfirmed the assurances provided to preserve the remaining records:

“The RCMP Commissioner has already provided his assurances that if for any reason the *Ending the Long Gun Registry Act* or the impending Supreme Court of Canada decision would necessitate that the Commissioner of Firearms destroy the non-restricted firearms records relating to the province of Quebec, that he will, prior to destruction, require the CIO sector of the RCMP hold for RCMP ATIP a copy of the final backup of the CFIS to permit the OIC to complete their investigation and for any related court requirements.”<sup>9</sup>

13. The Applicant acknowledged the assurances provided in her letter dated March 26, 2015.

In her Summary of the Timeline of Events at Appendix B, she confirmed that assurances had been provided:

“By email dated February 3, 2015, Mr. Tzemenakis provided the OIC with assurances on behalf of Commissioner Paulson that the RCMP would preserve the records identified by the OIC as being responsive to the request.”<sup>10</sup>

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<sup>8</sup> Exhibit J to Applicant's Affidavit, page 86

<sup>9</sup> Exhibit K to Applicant's Affidavit, page 104

<sup>10</sup> Exhibit GG to Applicant's Affidavit, page 188

14. By letter dated April 30, 2015, the Minister of Public Safety reiterated again that assurances had already been provided:

«Il semblerait que la GRD a répondu à votre troisième recommandation en préservant une copie des fichiers pertinents, afin de vous aider dans votre enquête qui n'est pas disponible aux services de l'application de la loi ni aux contrôleurs des armes à feu.»<sup>11</sup>

**3. Two sets of records have been preserved**

15. As explained below, the RCMP has maintained two back-up copies of the records at issue in this application. The first is a complete copy of the Canadian Firearms Information System (CFIS) as of April 3, 2015, which contains records related to non-restricted firearms belonging to individuals resident in Quebec and prohibited firearms and restricted firearms for the entire country. This is in essence a complete copy of CFIS as of April 3, 2015, which contains significantly more information and data than the records at issue. The second back-up is an external hard drive of the 64 fields and the 500,000 images that the Applicant believes are responsive to the underlying Application, without the remainder of the information that could be found in CFIS as of April 3, 2015.

**4. The Canadian Firearms Information System**

16. Firearms-related information required under the *Firearms Act* and associated regulations is stored in a fully integrated, customized automated information system called CFIS. It currently stores approximately 1.3 billion rows of data across 547 system tables.<sup>12</sup>

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<sup>11</sup> Exhibit II to Applicant's Affidavit, page 226

<sup>12</sup> Affidavit of Jennifer Walsh, Respondent's Motion Record ("RMR"), Tab X, para. 1.

## **5. The destruction of long-gun registry records in October 2012**

17. Pursuant to the *ELGRA*, the RCMP Canadian Firearms Program (“CFP”) developed an Implementation Plan which would delete the non-restricted registration records that were held within CFIS. Due to the technical complexity of CFIS, an algorithm which ensured the targeted data would be destroyed, while retaining the integrity of all other data within CFIS, took months to create. The deletion was executed in 2 phases. The first phase was to expire (make inactive) the non-restricted registration records. The second phase was to delete the records permanently.<sup>13</sup>
18. On May 20, 2012, 5.5 million non-restricted firearm registration records were set to an “expired” status within CFIS. These records did not include those related to residents of Quebec.<sup>14</sup>
19. Between October 26 and 31, 2012, 5.5 million non-restricted firearm registration records were then permanently deleted from CFIS. This deletion exercise included any backup copies of the data which existed.<sup>15</sup>

## **5. The preservation of long-gun registry records relevant to the Application**

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<sup>13</sup> Affidavit of Jennifer Walsh, RMR, Tab X, paras. 2 and 3.

<sup>14</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 4.

<sup>15</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 5.

20. Following the decision of the Supreme Court in the Constitutional challenge by Quebec regarding the *Ending the Long-gun Registry Act*, on April 3, 2015, the RCMP expired 1.6 million non-restricted firearm registration records for residents of Quebec. Between April 10 and April 12, 2015, the RCMP permanently destroyed the 1.6 million Quebec non-restricted firearm registration records in CFIS.<sup>16</sup>
21. Prior to the expiration of the Quebec registration records for non-restricted firearms, the RCMP CFP took two steps to retain the records. <sup>17</sup>
22. First, it made a complete copy of CFIS as it existed on April 3, 2015. This copy includes not only the Oracle database with the data, but also the architecture which allows for system functionality and linkages between the data. This complete copy of CFIS is the authentic copy of the complete record and would be the source from which the RCMP CFP would extract any additional data if ordered by the Court. <sup>18</sup>
23. The complete copy of CFIS is not directly readable data, and would require the creation of a user access interface, within its current technical environment, to view or review the data it contains. It is 472 GB in size. This copy of CFIS relies not only on the Oracle data base which retains the CFIS data, but also on the CFIS business logic (the Powerbuilder / Weblogic code) and the CFIS architecture (the 547 system tables) which

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<sup>16</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 6.

<sup>17</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 7.

<sup>18</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 8.

are critical to “de-normalize” the data in order to create linkages and allow for proper interpretation of the data.<sup>19</sup>

24. The complete copy of CFIS resides securely on a virtual server within the RCMP Data Centre, which is a climate-controlled secure facility with 24-hour maintenance within RCMP headquarters, and which has the infrastructure and technical personnel to support such technical hardware. Only the CFIS Data Base Administrator currently has access to the complete copy of CFIS. The RCMP has taken considerable measures to ensure the data is securely maintained and controlled.<sup>20</sup>
25. Creating a functional version of this copy of CFIS, outside the current RCMP technical environment, and transferring this copy of CFIS to the Court, is estimated to take months of effort due to the technical complexity of the CFIS architecture. It would require computer technicians to install an enterprise class server with at least 4 GB of RAM, 750 GB of “SAN” space, 100 GB of local space, 100 MB local space (on a desktop to run the CFIS front end application) and an Oracle Database licence in a secure and climate-controlled environment; the transportation of the data on information storage devices; the installation of the data and its architecture on this new server environment; testing to ensure the transfer was successful and did not corrupt or otherwise damage the data or architecture; and, ongoing maintenance of the new server environment. Greater risk of corruption or other damage to the records would exist in transferring this copy of CFIS to the Court Registry than in maintaining it in its current format and location.<sup>21</sup>

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<sup>19</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 9.

<sup>20</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 10.

<sup>21</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 11.

26. Second, the RCMP created a copy of the Quebec registration records for non-restricted firearms, selecting any data that may have been associated to the 64 fields identified by the Information Commissioner as relevant to registration records. This data, in a delimited text file, along with an estimated 500,000 images, is 1 terabyte in volume and resides on an external hard drive stored in a secure location to which only one individual has access.<sup>22</sup>
27. The delimited text file renders each record into a continuous row of data elements with no linkages to any of the 500,000 images (if any is associated to the registration record). Due to the volume of the records (1.6 million) as well as the amount of data for each record, this data is not practically readable and would require significant programming efforts to render it useable and reliable. It is estimated that the programming would take a minimum of 22 days and would result in a static output format, such as a spreadsheet, which significantly differs from that of CFIS.<sup>23</sup>
28. Both the Oracle database with functional architecture and the external hard drive described above are securely stored with very limited access and there is no risk of inadvertent destruction of the data. Neither the Oracle database nor the external hard drive is available to law enforcement and Chief Firearms Officers.<sup>24</sup>

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<sup>22</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 12.

<sup>23</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 13.

<sup>24</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 14.

29. Should verification of the retention be required, the RCMP would arrange access to the backup CFIS database within its native environment.<sup>25</sup>

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<sup>25</sup> Affidavit of Jennifer Walsh, RMR, Tab X, para. 15.

## PART II – ISSUES

30. There are two issues to be decided by the Court:

- (1) Whether the Applicant has satisfied all three branches of the *RJR-MacDonald* test for an interlocutory injunction?
- (2) If yes, what is the appropriate remedy?

## PART III – ARGUMENT

### THE APPLICANT HAS NOT SATISFIED THE TEST FOR AN INTERIM INJUNCTION

#### 1. Current Situation

31. There is no dispute that the current assurances provided by the Minister of Public Safety and the Commissioner of the RCMP, summarized above at paragraphs 11 to 14, remain in force and are being respected. These assurances were provided as early as February 2015 and have been maintained. These assurances demonstrate that the actions of the RCMP and the Respondent Minister following the commencement of the Applicant's investigation were in keeping with the current state of the law, meaning that the records were kept to allow for the resolution of the access request and this Application. Otherwise the records at issue could legally have been destroyed following the passage of the Supreme Court of Canada's decision in *Quebec (Attorney General) v. Canada (Attorney General)*.<sup>26</sup>

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<sup>26</sup> 2015 SCC 14

32. The reference by the Applicant to past alleged breaches of assurances is, with respect, irrelevant as they are more properly related to the merits of the application, if at all. It is the position of the RCMP that they destroyed certain long-gun registry records in October of 2012, in accordance with the *ELGRA*, believing that they had maintained a responsive copy of the records for the requestor:

“The RCMP ATIP personnel understood these comments from the OIC as being agreement that A-2012-00183 was responsive to A-2012-0085. In addition, this made sense as request A-2012-00183 was broader than request A-2012-0085. Any information released for request A-2012-00183 would necessarily include releasable/ non-exempt information responsive to request A-2012-0085.”<sup>27</sup>

## **2. The Request for an Injunction**

33. This motion is predicated on the passage of Bill C-59 which is intended to conclusively implement the will of Parliament by destroying any remaining long-gun registry records in CFIS relating to residents from Quebec. The Bill is not intended to limit access to records about the destruction of the long-gun registry records.

### **a. The Test for an Injunction**

34. An applicant seeking an interlocutory injunction must meet the tri-partite test set out by the Supreme Court of Canada in *RJR-MacDonald*:

- (a) Is there a serious question to be tried?
- (b) Will the applicant suffer irreparable harm if the interlocutory injunction is not granted?

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<sup>27</sup> Exhibit K to the Applicant’s Affidavit, page 102, third paragraph from bottom, “The RCMP ATIP personnel.

(c) Does the balance of convenience favour the granting of the interlocutory injunction?<sup>28</sup>

35. The test is conjunctive, meaning that all three branches must be met before the Plaintiff is entitled to relief.<sup>29</sup> However, the Courts have also clarified that the three branches of the test are not watertight compartments, and that the strength of one can compensate for the weakness of another. Ultimately, the Applicant must show that it is in the interests of justice to grant the remedy sought.<sup>30</sup>

**b. No Position as to whether there is a serious question**

36. Generally, the threshold for making out a serious question is a low one, in that the moving party must show that the underlying application is neither vexatious nor frivolous. The Respondent takes no position on the issue of whether the Applicant has raised at least one issue in the underlying application that is serious.<sup>31</sup>

**c. No position as to whether there is irreparable harm**

37. The issue of whether the Applicant will suffer irreparable harm relates to the nature of the harm, not its magnitude. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect

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<sup>28</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at paras XXX.

<sup>29</sup> *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 3.

<sup>30</sup> *Yaiguaje v Chevron Corporation*, 2014 ONCA 40 at para 19.

<sup>31</sup> *RJR-MacDonald*, *supra* note 28 at paras 44, 50, 78, **Applicants' Authorities, Tab X**; see also *Glooscap Heritage Society v Canada (Minister of National Revenue)*, 2012 FCA 255 at para 25 [*Glooscap*], **Respondent's Authorities, Tab X**.

damages from the other. Furthermore, the harm claimed must be demonstrated to be clear and not speculative.<sup>32</sup>

38. It is not enough for a party to show that irreparable harm *may arguably result* if the injunction is not granted. Allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking an injunction to show that irreparable harm *will result*.<sup>33</sup> To do so, specific and concrete evidence of irreparable harm must be adduced:

To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight.<sup>34</sup>

39. The Respondent takes no position on the issue of whether there is irreparable harm.

**d. The Balance of Convenience favours the Respondent**

40. The third part of the *RJR-Macdonald* test requires the Court to consider whether the balance of convenience favours the Applicant or the Respondent. The factors to be considered include the nature of the relief sought, the harm the parties allege they will suffer, the nature of the legislation under attack, and where the public interest lies.<sup>35</sup>

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<sup>32</sup> *RJR-MacDonald*, *ibid* at para 64.

<sup>33</sup> *International Longshore and Warehouse Union, Canada v. Canada*, 2008 FCA 3 at paras 22-25.

<sup>34</sup> *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255 at para 31.

<sup>35</sup> *RJR-MacDonald*, *supra* note 39 at para 90.

41. In assessing the balance of convenience, a court must proceed on the basis that a law, in this case the Bill to be enacted,<sup>36</sup> is directed to the public good and serves a valid public purpose.<sup>37</sup> Bill C-59 is presumed to be valid and constitutional once passed and to have been passed in the public interest for the public good. As observed by the Supreme Court in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically –elected legislatures and are generally passed for the common good... It seems axiomatic that the granting of interlocutory injunctive relief ... is susceptible temporarily to frustrate the pursuit of the common good.<sup>38</sup>

42. A party may “tip the scales of convenience in its favour” by demonstrating a compelling public interest in granting or refusing the relief sought.<sup>39</sup> When the stated purpose of a contested piece of legislation, of a regulation or of an activity is to promote the public interest, the question of whether it actually does so is irrelevant; promotion of the public interest must be assumed.<sup>40</sup> In *RJR-MacDonald*, the Supreme Court stated:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. **The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public**

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<sup>36</sup> This is an exceptional situation. Courts have seen fit to refrain from pronouncing upon, or otherwise taking account of, a bill that has not yet completed its way through the Parliamentary process: *Sethi v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 552 (C.A.).

<sup>37</sup> *Harper v. Canada (Attorney General)*, 2000 SCC 57, at para. 9; see also *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at para. 56.

<sup>38</sup> *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, at para. 56.

<sup>39</sup> *RJR-MacDonald*, *ibid* at paras 71 and 85.

<sup>40</sup> *RJR-MacDonald*, *ibid* at para 85; see also *Laperrière v D&A MacLeod Company Ltd.*, 2010 FCA 84 at para 12.

**interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.** Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.<sup>41</sup> (Emphasis added)

43. In *Harper v. Canada (Attorney General)*, McLachlin C.J. emphasized that:

The assumption of the public interest in enforcing the law weighs heavily in the balance. **Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.**<sup>42</sup> (Emphasis added)

44. In the circumstances, the balance of convenience and the public interest favours the Respondent. The Supreme Court has ruled that the matter of the registration and data retention provisions under the *Firearms Act* is a matter of public safety.<sup>43</sup> In March of 2015, the Supreme Court ruled that section 29 of the *ELGRA* relates to public safety, as did the long-gun registration scheme being repealed by the *ELGRA*.<sup>44</sup>

45. Division 18 of Bill C-59 amends section 29 of the *ELGRA*. Division 18 is a matter of public safety, a policy choice that Parliament is constitutionally entitled to make, and must be presumed to be a lawful exercise of Parliament's criminal law legislative power under the Constitution.

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<sup>41</sup> *RJR-MacDonald*, *supra* note 39 at para 76 [emphasis added].

<sup>42</sup> *Harper v. Canada (Attorney General)*, 2000 SCC 57, at para. 9.

<sup>43</sup> *Reference re Firearms*, 2000 SCC 31, at para XX.

<sup>44</sup> *Quebec AG v Canada AG*, 2015 SCC 14, at para XX.

46. The clearly expressed will of Parliament in the *ELGRA* is to destroy records related to the long-gun registry as soon as feasible. Division 18 of Bill C-59 reconfirms the will of Parliament and removes the use of other statutory vehicles, such as the *ATIA*, to frustrate that objective.
47. Parliament has seen fit to specifically address the provisions of the *ATIA* in Division 18. In subsection 231(7), Parliament has indicated that these provisions take precedence over “any other Act of Parliament”, including the *ATIA*:

(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.
48. The decision to dismantle the long-gun registry, including provisions describing what will happen to the data collected under the repealed scheme is a policy choice that Parliament was, and is, constitutionally entitled to make.<sup>45</sup>
49. Contrary to paragraph 96 of the Applicant’s Memorandum of Fact and Law, the decision of *Quebec (Procureur général) c. Canada (Procureur général)* is distinguishable. The underlying application in that matter raised issues relating to the division of powers and constitutional authority of Parliament. The underlying application in this matter is the right of access by one individual to records that Parliament has democratically determined should be destroyed.

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<sup>45</sup> Cite 2015 SCC 14 at para XXX .

50. Finally, the Applicant's position at paragraph 98 of her Memorandum of Fact and Law is wholly inconsistent. The Applicant's motion is premised on the passage of Bill C-59. She is incorrect at law when she argues that the complainant's right of access and the court's review take precedence over the *ELGRA*. Division 18 of Bill C-59 reconfirms the will of Parliament. If passed in its current form, Parliament will have expressly stated that the provisions of *ELGRA* take precedence.<sup>46</sup>

51. For these reasons, the Respondent submits that the balance of convenience favours dismissing this motion.

**IN THE ALTERNATIVE, THE APPROPRIATE REMEDY IS PRESERVATION NOT TRANSFER**

52. In the alternative, should the Court determine that the Applicant has met the tri-partite test set out above, the question to be resolved by the Court on this motion would be whether either of the Applicant's alternative remedies is appropriate in the circumstances.

53. In crafting an appropriate remedy, the Court should consider what would achieve the goals of the motion without imposing a disproportionate or impractical burden on either of the parties.<sup>47</sup> The Court should also consider the practical implications of transferring data that is of no utility to the Court in the underlying Application.

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<sup>46</sup> *Bogoch Seed Company v. C.P.R. and C.N.R.*, [1963] SCR 247.

<sup>47</sup> *Enbridge Pipelines Inc. v. Jane Doe*, 2014 ONSC 4716 at para. 18; *Makhija v. Canada (Attorney General)*, 2010 FC 141 at para. 85.

### **1. Transfer is Impractical**

54. On a practical level, the transfer of the records, being the complete copy of the CFIS database and its architecture to the Court Registry, involves disproportionate technical demands on the Court and the Respondent. It additionally poses a greater risk to the records than leaving them securely stored in their current environment.
55. In this instance, and as described more thoroughly above, the first remedy requested by the Applicant would impose a significant burden on both the federal Crown and the Court, in terms of the practical realities of creating the facility in which the data might be stored by the latter and transferring the data and its architecture. The data which the Applicant seeks to protect is currently protected against inadvertent destruction by a robust set of technical and maintenance measures in its present environment, thereby realizing the goal the Applicant states she is seeking by this motion.
56. The transfer of the external hard drive bearing the textual data and associated but unlinked images would be technically feasible, but would serve no practical purpose, as it is in an unreadable format. Rendering the data on the external hard drive readable would create new records rather than preserve a copy of the original records, as required by the *ATIA* and as requested by the Applicant in her motion.
57. The external hard drive containing simply the string of data from each record cannot reasonably be considered to be the “record at issue”. The authentic copy of the data is that from which additional data would be extracted, should the Applicant be successful on her application.

## PART IV – ORDER REQUESTED

58. The Respondent requests that this motion be dismissed, with costs.

59. In the alternative, the Respondent requests that the Court order as follows:

- Consistent with the assurances provided to date, the records at issue in this Application will be preserved in their current form and location until the final disposition of this Application or the Court orders otherwise.
- The Respondent will file confidentially a representative sample of the records at issue in a form agreeable to the parties within 30 days of the date of this Order, and provide a copy confidentially to counsel for the Applicant.

June 17, 2015

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Per: **Gregory S. Tzemenakis**  
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Barristers & Solicitors  
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Tel: (613) 786-0135  
Fax: (613) 788-3430

Counsel for the Applicant

## PART V – AUTHORITIES

*Ending the Long-gun Registry Act*

*Bogoch Seed Company v. C.P.R. and C.N.R.*, [1963] SCR 247.

*Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214.

*Enbridge Pipelines Inc. v. Jane Doe*, 2014 ONSC 4716.

*Glooscap Heritage Society v Canada (Minister of National Revenue)*, 2012 FCA 255.

*Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255.

*Harper v. Canada (Attorney General)*, 2000 SCC 57.

*International Longshore and Warehouse Union, Canada v. Canada*, 2008 FCA 3.

*Laperrière v D&A MacLeod Company Ltd*, 2010 FCA 84.

*Makhija v. Canada (Attorney General)*, 2010 FC 141.

*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110.

*Quebec AG v Canada AG*, 2015 SCC 14.

*Reference re Firearms*, 2000 SCC 31.

*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

*Yaiguaje v Chevron Corporation*, 2014 ONCA 40.

Court File:

T-785-15

FEDERAL COURT

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

- and -

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

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NOTICE OF APPLICATION

Application under paragraph 42(1)(a) of the *Access to  
Information Act*, R.S.C. 1985, c. A-1

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard in Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is

page 2

self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

**DATED** at Gatineau, this 14<sup>th</sup> day of May 2015.

Issued by:

(Registry Officer)

ANN E. MURPHY

REGISTRY OFFICER

REGISTRE DU COURS

Address of local office: Federal Court  
Thomas D'Arcy McGee Building  
90 Sparks Street  
Ottawa, Ontario  
K1A 0H8

**TO:** The Hon. Steven Blaney, P.C., M.P.  
The Minister of Public Safety and Emergency Preparedness  
269 Laurier Avenue West  
Ottawa, Ontario  
K1A 0P8

**NOTICE TO THE COMPLAINANT**  
**(Subsection 42(2) of the *Access to Information Act*)**

**AND TO:** Mr. Bill Clennett  
86 rue Isidore-Ostiguy  
Gatineau, Quebec  
J8X 3B9

Take notice that the Information Commissioner of Canada (the "OIC") has made an Application for Review to the Court pursuant to s. 42(1)(a) of the *Access to Information Act*. You have the right to apply independently to the Federal Court for judicial review of the decision by the Minister of National Defence to refuse to disclose records requested by you pursuant to section 41 of the Act.

Subsection 42(2) of the Act also gives you the right to appear as a party to the Information Commissioner's Application for Review. If you wish to appear as a party to

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the Information Commissioner's Application for Review, you must prepare a Notice of Appearance as a Party and serve it on the applicant's solicitor and on the respondent within 10 days from the date you were served with this Application for Review.

I HEREBY CERTIFY that the above document is a true copy of  
the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme  
à l'original déposé au dossier de la Cour fédérale.

Filing date MAY 14 2015  
Date de dépôt

MAY 14 2015  
Dated  
Fait le

*ADM R. MELVILLE  
RECEIVED  
RCG*

## APPLICATION

1. This is an application for judicial review, pursuant to paragraph 42(1)(a) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the "Act") in respect of the refusal of the Minister of Public Safety and Emergency Preparedness (the "Minister"), in his capacity as head of the government institution responsible for the Royal Canadian Mounted Police (the "RCMP"), to disclose records requested under the Act (RCMP Institutional File No. A-2012-00085; OIC Investigation File No. 3212-01427).
2. This application is made with the consent of the requester, Mr. Bill Clennett (the "requester").
3. On March 27, 2012, the requester made a request to the RCMP for an electronic copy of all records contained in the Canadian Firearms Registry related to the registration of non-restricted firearms, commonly referred to as "long-guns."
4. On April 5, 2012, the *Ending the Long-gun Registry Act* (the "ELRA") came into force. Subsection 29(1) of the ELRA requires the Commissioner of Firearms to destroy, as soon as feasible, all records in the Canadian Firearms Registry related to the registration of non-restricted firearms. Information related to the registration of non-restricted firearms is contained within the Canadian Firearm Information System (the "CFIS").
5. The requester's request mirrored the language used in subsection 29(1) of the ELRA.
6. On April 13, 2012, the Information Commissioner wrote the former Minister of Public Safety and Emergency Preparedness, the Honourable Vic Toews, to notify him that any records under the control of the Commissioner of Firearms and /or the Canadian Firearms Program, for which a request had been received under the Act before the coming into force of subsection 29(1) of the ELRA, are subject to the right of access and cannot be destroyed until a response has been provided under the Act and any investigations and related court proceedings are completed.
7. On May 2, 2012, Mr. Toews responded to the Information Commissioner, copying the Director of Access to Information and Privacy, RCMP, and stated: "With respect to your question on destruction of records in the CFIS, please be assured that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard."
8. On July 25, 2012, the requester made a fee complaint to the Office of the Information Commissioner (the "OIC") after the RCMP notified him, on July 5, 2012; that, pursuant to subsection 11(2) of the Act, it would apply a fee of \$1150 in order to process his request.

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9. On October 25, 2012, the RCMP was informed that the requester had clarified his request in the following terms: « Je désire avoir accès à la base de données du registre d'armes à feu. » [“I would like to have access to the Firearms Registry database” (translation)]. As noted above (at para. 4), the requested information in the Canadian Firearms Registry is contained within the CFIS.
10. Between October 25 and October 29, 2012, the RCMP destroyed all electronic records relating to the registration of non-restricted firearms in the CFIS, other than those registered to residents of Quebec. These Quebec records were then the subject of ongoing judicial proceedings in which the Attorney General of Quebec sought a declaration that section 29 of the ELRA was unconstitutional and an order that the Province of Quebec had a right to obtain from the federal government all data from Quebec related to the registration of non-restricted firearms.
11. On December 17, 2012, the Information Commissioner again wrote to former Minister Toews to confirm whether records under the control of the RCMP as of the date of the requester’s request of March 27, 2012 had been destroyed or whether an integral copy of the long-gun registry had been preserved to protect the requester’s right of access under subsection 4(1) of the Act.
12. On January 11, 2013, the RCMP responded to the requester’s request and provided 16 columns of information (Make, Model, Manufacturer, Type, Action, Class, Barrel Length, Calibre, Shots, Registration Date, Province, Postal Code, Client Type, Firearm Stolen Date, Firearm Loss Date, and Recovered Date) and 8,016,810 rows of records.
13. On February 1, 2013, the requester complained to the OIC that the RCMP failed to provide all records responsive to his request made under the Act. The RCMP was notified, on February 22, 2013, that the OIC had received and registered the requester’s February 1 missing records complaint.
14. On February 5, 2013, former Minister Toews responded as follows to the Information Commissioner’s letter of December 17, 2012: “With respect to your question on destruction of records in the CFIS, I am assured by the RCMP Commissioner that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.”
15. On February 14, 2013, the OIC reported that all parties agreed to consider the requester’s fee complaint as settled.
16. On July 8, 2014, the Information Commissioner issued an order for the production of records pursuant to paragraph 36(1)(a) of the Act and a further production order on July 28, 2014. The RCMP completed its response to these production orders on October 31, 2014.
17. On December 18, 2014, investigators from the OIC interviewed two RCMP

employees with direct knowledge of the CFIS through their responsibilities for overseeing the destruction of electronic records from the CFIS that took place between October 25 and 29, 2012 and conducting the associated audit, respectively. Both employees were present during the destruction of these records from the CFIS.

18. On December 29, 2014, the OIC investigators visited the Canadian Firearms Program (CFP), viewed the CFIS in its production environment and recorded several screen shots of the current state of the CFIS.
19. On January 19, 2015, the Information Commissioner wrote to the Commissioner of the RCMP, Robert Paulson, to provide him with an opportunity, pursuant to paragraph 35(2)(b) of the Act, to make representations with respect to the Information Commissioner's preliminary findings. The Information Commissioner also requested assurances from Commissioner Paulson that the RCMP would take steps to ensure that the records she had identified as responsive to the request would be preserved.
20. By email dated February 3, 2015, counsel for the RCMP provided the Information Commissioner with the assurances on behalf of Commissioner Paulson that the RCMP would preserve the records identified by the Information Commissioner as responsive to the request.
21. On February 20, 2015, the office of the Chief Strategic Policy and Planning Officer provided the OIC with representations on behalf of the RCMP.
22. On March 26, 2015, the Information Commissioner wrote to the Minister pursuant to subsection 37(1) of the Act to report the results of her investigation and to make recommendations to him, as the head of the institution responsible for the RCMP (the "Section 37 Report"). The Information Commissioner determined that the requester's complaint was well-founded. She recommended not only that the RCMP process and release to the requester all of the information responsive to his request that had not been destroyed between October 25 and 29, 2012, but also that it preserve these responsive records until the conclusion of her investigation and any related proceedings. The Information Commissioner also requested that the Minister inform her, by April 10, 2015, as to whether he intended to implement her recommendations.
23. On March 26, 2015, the Information Commissioner referred to the Attorney General of Canada, pursuant to subsection 63(2) of the Act, information relating to the possible commission of an offence under paragraph 67.1(1)(a), which provides that no person shall, with the intent to deny a right of access under the Act, destroy, mutilate or alter a record. The Information Commissioner indicated that the investigation conducted by the OIC had established that the RCMP destroyed records responsive to an outstanding access request with the knowledge that these records were subject to the right of access guaranteed by subsection 4(1) of the Act.

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4. More particularly, the Information Commissioner noted that the following factual information relates to the possible commission of an offence under paragraph 67.1(1)(a): the RCMP destroyed records contained in the CFIS that related to an access request that had been made prior to the coming into force of the ELRA; the RCMP destroyed these records with the knowledge that they related to an outstanding access request and an ongoing OIC investigation; the RCMP destroyed these records despite the Information Commissioner's letter, dated April 13, 2012, to the Minister of Public Safety, copying the Commissioner of the RCMP; which clearly stated that these records are subject to the right of access guaranteed by the Act and may not be destroyed until a response has been provided to the requester and any related investigation and court proceedings are completed; and that, as determined in the OIC investigation, millions of the records destroyed by the RCMP were responsive to the underlying access request, which remains outstanding.
25. In her March 26, 2015 letter to the Minister, the Information Commissioner notified both the Minister and Commissioner Paulson that she intended to refer this matter to the Attorney General.
26. On March 27, 2015, the Supreme Court of Canada issued its judgment in *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 in which it upheld the constitutionality of section 29 of the ELRA.
27. On April 2, 2015, the Minister requested an extension of 20 days, until April 30, 2015, to respond to the Section 37 Report. On the same day, the Information Commissioner granted the 20 day extension on the understanding that the RCMP would provide a response to her Section 37 Report no later than April 30, 2015.
28. On April 30, 2015, the Minister informed the Information Commissioner that, in light of the representations made to her by the RCMP, he was of the view that the requester had already received the records responsive to his request. Therefore, the Minister informed the Information Commissioner that he had no intention of following her recommendations to process additional information. The Minister also indicated that it appeared the RCMP had responded to the Information Commissioner's recommendation to preserve the responsive records by making a copy of the responsive records in keeping with the assurances it had provided.
29. On May 13, 2015, the Information Commissioner reported to the requester that her investigation had determined that the RCMP failed to provide him with all of the records responsive his request and, in particular, that it had destroyed responsive records and refused to process and release existing responsive records.

page

**The applicant makes application for:**

1. A declaration that the Minister has failed to provide access to responsive records requested under the Act;
2. An order directing the Minister to process the request in keeping with the Information Commissioner's recommendations within 30 days of judgment; and
3. Such further and other orders as Counsel may request and this Honourable Court may deem just or appropriate.

**The grounds for the application are:**

1. The Commissioner has determined that the Minister did not provide the requester with access to all of the records responsive to his request;
2. The Minister has refused to implement the Information Commissioner's recommendations with respect to the appropriate processing of the request; and
3. Such other grounds as counsel for the applicant may advise and the Court may permit.

**The statutory provisions and regulations relied on include:**

4. The *Access to Information Act* in general and in particular: ss. 2(1), 4(1), 4(2.1), 11, 30, 32, 34, 35, 36, 37, 42(1)(a), 42(2), 48, 49, 63(2) and 67.1(1)(a) of the Act;
5. The *Ending the Long-gun Registry Act* in general and in particular: s. 29.
6. Rule 300(b) of the *Federal Courts Rules*, SOR/98-106; and
7. Such other statutory provisions and regulations as counsel for the Applicant may advise and the Court may permit.

**This application will be supported by the following material:**

- a) The affidavit of an investigator or other employee of the Office of the Information Commissioner, to be sworn at a later date, to which will be appended as exhibits those documents relevant to the subject matter of the application, and;
- b) Such further and other material as the Applicant may advise and this honourable Court may permit.

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The Applicant's address is 30 Victoria Street, 7<sup>th</sup> Floor, Gatineau, Quebec, K1A 1H3 and the names and business addresses of the applicant's counsel are:

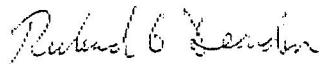
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Telephone: 819-994-2194    Fax: 819-994-0311

**DATED** at Gatineau, this 14th day of May, 2015.



---

Richard G. Dearden  
Counsel for the Information  
Commissioner of Canada

**Pages 212 to / à 263  
are withheld pursuant to sections  
sont retenues en vertu des articles  
21(1)(a), 21(1)(b), 23  
  
of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 264  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 265 to / à 266  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 267  
is not relevant  
est non pertinente**

**Pages 268 to / à 269  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 270 to / à 271  
are not relevant  
sont non pertinentes**

**Page 272  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 273 to / à 274  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 275 to / à 279  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 280  
is not relevant  
est non pertinente**

**Pages 281 to / à 283  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 284**

**is withheld pursuant to sections  
est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(d), 69(1)(g) re (a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 285  
is not relevant  
est non pertinente**

**Pages 286 to / à 287  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**69(1)(d), 69(1)(g) re (a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 288  
is not relevant  
est non pertinente**

**Page 289**  
**is withheld pursuant to sections**  
**est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**Page 290**

**is withheld pursuant to sections  
est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(g) re (a), 69(1)(g) re (d)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 291**

**is withheld pursuant to sections**

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**21(1)(a), 21(1)(b), 23, 69(1)(g) re (d)**

**of the Access to Information Act**

**de la Loi sur l'accès à l'information**

**Page 292**  
**is withheld pursuant to sections**  
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**21(1)(a), 21(1)(b), 23**  
**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**Page 293**

**is withheld pursuant to sections**

**est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(g) re (a)**

**of the Access to Information Act**

**de la Loi sur l'accès à l'information**

**Page 294**

**is withheld pursuant to sections  
est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(g) re (a), 69(1)(g) re (e)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 295 to / à 297  
are withheld pursuant to sections  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 298 to / à 305  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 306 to / à 310  
are not relevant  
sont non pertinentes**

Information  
Commissioner  
of Canada

Commissaire  
à l'information  
du Canada

112 Kent Street  
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**PROTECTED B**

APR 13 2012

The Honourable Vic Toews, P.C., M.P.  
Minister of Public Safety and Emergency Preparedness  
Public Safety Canada  
Minister's Office  
269 Laurier Avenue West  
Ottawa, Ontario K1A 0P8

Our file: 3211-01340  
RCMP file: GA-3951-3-00183/12

Dear Minister Toews:

I write to you in your capacity as head of the Royal Canadian Mounted Police (the RCMP) pursuant to the *Access to Information Act* (the Act) with regard to a complaint under the Act that I am currently investigating. That complaint relates to a request made to the RCMP on December 28, 2011, for "a copy of the Canadian Firearms Information System (the gun registry database) with the same level of information released in A-2008-04874 but from the inception of the registry under December 19, 2011."

On January 20, 2012, the RCMP replied to the request, informing the requester that a total of \$1,500.00 had been assessed under subsection 11(2) of the Act for search and preparation of the responsive records.

On February 29, 2012, my office received a complaint from the requester about the RCMP's assessment of fees and on March 20, 2012, the RCMP was provided with a notice of intention to investigate and summary of complaint in relation to this complaint. Also, we requested that the RCMP provide specific information and records to this office in relation to the complaint.

- 2 -

PROTECTED B

While we have not, at this time, requested a copy of the records responsive to the underlying request, I am writing to you now to ensure that these records are preserved pending a substantive response to the request and the expiry of any time period to make a complaint on the response to my office and any related court proceedings.

I am aware that the *Ending the Long-gun Registry Act, 2012*, c. 6 (the new Act) received Royal Assent on April 5, 2012, and will come into force on a day or days to be fixed by Order in Council. Upon coming into force, this new Act will amend the *Criminal Code* and the *Firearms Act* to remove the requirement to register firearms that are neither prohibited nor restricted. It will also provide for the destruction of existing records, held in the Canadian Firearms Registry and under the control of firearms officers, which relate to the registration of such firearms.

Indeed, pursuant to subsection 29(1) of the new Act, the Commissioner of Firearms will have the responsibility of ensuring the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited nor restricted, and all copies of those records under the Commissioner's control.

Given the impending coming into force of this new legal requirement, I thought it prudent to write to you at this time to alert you to the fact that any records responsive to requests made under the Act prior to the coming into force of this provision are subject to the right of access to any record under the control of a government institution recognized by subsection 4(1) of the Act. This is to say that any records under the control of the RCMP, including those under the control of the Commissioner of Firearms and/or the Canadian Firearms Program, for which a request has been received under the Act before the coming into force of subsection 29(1) of the new Act are subject to the right of access and cannot be destroyed until a response has been provided under the Act and any related investigation and court proceedings are completed. This, of course, applies to the records responsive to the above-noted request.

I request that you inform me by **April 30, 2012**, whether you agree not to destroy any records in the Canadian Firearms Registry related to the registration of non-prohibited and non-restricted firearms and that are responsive to requests under the Act received by the RCMP before the coming into force of subsection 29(1) of the new Act.

- 3 -

**PROTECTED B**

Should your officials wish to discuss any aspect of this matter before April 30, 2012, they may communicate with Emily McCarthy, Acting Assistant Commissioner at (613) 995-2665.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Suzanne Legault". The signature is fluid and cursive, with a large, stylized 'S' at the beginning.

Suzanne Legault

c.c.: Commissioner of the RCMP

RCMP ATIP Coordinator

.../3

Suzanne Legault

Minister of Public Safety

Ministre de la Sécurité publique

Ottawa, Canada K1A 0P8

MAI 2 2012

Ms. Suzanne Legault  
Information Commissioner of Canada  
112 Kent Street  
Ottawa, Ontario K1A 1H3



Dear Ms. Legault:

Thank you for your correspondence of April 13, 2012, regarding a complaint filed under the *Access to Information Act* related to a request for information pertaining to the Canadian Firearms Information System (CFIS).

I have provided a copy of your correspondence to the Royal Canadian Mounted Police (RCMP) and have been advised that they will contact your office directly to assist with the resolution of this complaint in a timely manner.

With respect to your question on destruction of records in the CFIS, please be assured that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

I trust that this information addresses your concerns.

Yours sincerely,

*Vic Toews*

Vic Toews, P.C., Q.C., M.P.

c.c.: Superintendent Yves Marineau  
Officer in charge, RCMP Access to Information and Privacy Branch

Canada



Information  
Commissioner  
of Canada

Commissaire  
à l'information  
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COMMISSIONER'S  
OFFICE

DEC 29 2012

BUREAU DU  
COMMISSAIRE

PROTECTED B

December 17, 2012

The Honourable Vic Toews, P.C., M.P.  
Minister of Public Safety and Emergency Preparedness  
Public Safety Canada  
Minister's Office  
269 Laurier Avenue West  
Ottawa ON K1A 0P8

**Our file:** 3212-00525 et al.  
**Institution's file:** A-2012-00085 et al.

Dear Minister Toews:

I am writing to you further to my letter of April 13, 2012, and your response of May 2, 2012, concerning records responsive to a request / requests under the *Access to Information Act* (the Act) for records contained in the RCMP's long gun database.

You will recall that I wrote to you in your capacity as head of the Royal Canadian Mounted Police (RCMP) pursuant to the Act with regard to a complaint, then, under investigation by my office pursuant to the Act involving a request for a copy of the long-gun registry database (file: 3211-01340 / GA-3951-3-00183/12). In this letter, I asked that you ensure that records responsive to that request be preserved pending the resolution of that complaint and any related court proceedings. In your response, dated May 2, 2012, you assured me that "...the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard".

Since this time, my office completed and reported the results of our investigation in file 3211-01340 / GA-3951-3-00183/12. However, my office continues to investigate other complaints involving responses by the RCMP to requests for records involving the long-gun registry. This includes our file 3212-00525 (RCMP file: A-2012-00085), referred to above, concerning fees assessed by the RCMP in response to a request received on March 27, 2012, for access to the

**PROTECTED B**

Page 2

long-gun registry.<sup>1</sup> My office notified the RCMP of the substance of this complaint on August 10, 2012.

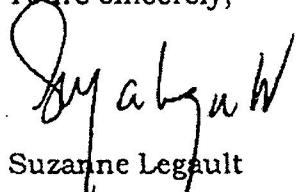
I am concerned by recent media coverage that has reported that the long-gun registry, with the exception of registry information related to Quebec, has been destroyed. Among these media accounts is the Canadian Broadcasting Corporation's coverage on November 2, 2012, which reported that your office had confirmed that the long-gun registry was destroyed on November 1, 2012.

Please be advised that the destruction of records responsive to requests made while the information in the long-gun registry was under the control of the RCMP would be contrary to subsection 4(1) and could be in contravention of section 67.1 of the Act.

I therefore request that you inform me by **January 14, 2013**, whether in fact the government has destroyed records that were under the control of the RCMP as of the date of the request, namely March 27, 2012, or whether an integral copy of the long-gun registry has been preserved in order to protect the requester's right of access under subsection 4(1) of the Act.

Should you or your officials wish to discuss any aspect of this matter before that date, they may communicate with Emily McCarthy, Assistant Commissioner at (613) 995-2665.

Yours sincerely,



Suzanne Legault

c.c.    Commissioner of the RCMP  
RCMP ATIP Coordinator

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<sup>1</sup> The wording of the original request is as follows:

*« Une copie électronique de: a) tous les registres et fichiers relatifs à l'enregistrement des armes à feu autre que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui se trouvent dans le Registre canadien des armes à feu et qui relèvent du commissaire aux armes à feu; et b) tous les registres et fichiers relatifs à l'enregistrement des armes à feu autre que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui relève de chaque contrôleur des armes à feu ».*

On October 25, 2012, the requester clarified that what is being sought is "... accès à la base de données du registre d'armes à feu".

Minister of Public Safety



Ministre de la Sécurité publique

Ottawa, Canada K1A 0P8

FEB 05 2013

Ms. Suzanne Legault  
Information Commissioner of Canada  
112 Kent Street  
Ottawa, Ontario K1A 1H3

Dear Ms. Legault:

Thank you for your correspondence of December 17, 2012, regarding complaints filed under the *Access to Information Act* related to request for information pertaining to the Canadian Firearms Information System (CFIS).

I have provided a copy of your correspondence to the Royal Canadian Mounted Police (RCMP) and have been advised that they will contact your office directly to assist with the resolution of any complaints in a timely manner.

With respect to your question on destruction of records in the CFIS, I am assured by the RCMP Commissioner that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

I trust that this information addresses your concerns.

Yours sincerely,

Vic Toews, P.C., Q.C., M.P.

Canada

**Page 318  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 319 to / à 330  
are not relevant  
sont non pertinentes**



Royal Canadian Mounted Police Gendarmerie royale du Canada

Ottawa, Canada K1A 0R2

Ms. Suzanne Legault  
Information Commissioner  
Office of the Information Commissioner  
of Canada  
30 Victoria Street  
Gatineau, Quebec  
K1A 1H3

Dear Ms. Legault:

Thank you for this opportunity to respond and make representations with respect to your preliminary findings pursuant to paragraph 35(b) of the *Access to Information Act*.

An explanation of the handling of this file necessarily requires that I provide you with information on the Canadian Firearms Information System (CFIS), the Firearms Registry, and the Royal Canadian Mounted Police (RCMP) internal process with respect to requests for information found within the CFIS.

### General

There is no single repository of information called the Firearms Registry. Information related to the registration of firearms is contained within a greater repository of information, that being the CFIS. The CFIS contains information related to licensing—firearms licences issued to individuals and businesses by Chief Firearms Officers (CFO).<sup>1</sup> The CFIS also contains information related to the registration of firearms. Some of the information in the CFIS relates to the registration of firearms only, some relates to the licensing of individuals and businesses only, and some of the information pertains to both the registration and licensing regimes.

.../2

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<sup>1</sup> CFIS also contains information on carrier licences; these are the only kinds of licences issued by the Registrar of Firearms. Carriers are transportation businesses such as airlines. The references to licences in this document are to firearms licences issued to individuals to possess and acquire firearms and to businesses to carry on firearms businesses.

- 2 -

The *Ending the Long-gun Registry Act*, which came into force on April 5, 2012, did not affect the licensing requirements in the *Firearms Act*. Its main impact was on the registration of non-restricted firearms, commonly known as "long guns."

Firearms licence holders who own restricted and prohibited firearms are required to register their firearms. Because of a court order, firearms licence holders in Quebec must also register non-restricted firearms.

### Canadian Firearms Program

The Canadian Firearms Program (CFP) does not have any data on any non-restricted firearms, other than that regarding individuals and businesses in Quebec. All non-restricted firearm data for individuals and businesses in the rest of Canada were destroyed in October 2012, pursuant to the *Ending the Long-gun Registry Act*.

### Licensing Regime

There are over 1.9 million firearms licence holders in Canada. Not all firearms licence holders own firearms.

CFOs have responsibility for the licensing regime. The firearms licensing regime comprises firearms licences and a number of other authorizations, which the *Firearms Act* empowers CFOs to administer.

Prince Edward Island, Nova Scotia, New Brunswick, Ontario and Quebec opted to have provincially appointed CFOs. These provinces are often referred to as "opt-in" provinces. Newfoundland and Labrador, Manitoba, Saskatchewan, Alberta, British Columbia and the Territories have federally appointed CFOs. There are agreements between Canada and the "opt-in" provinces whereby Canada agreed, among other things, to provide a database to house licensing information.

### Registration Regime

The Registrar of Firearms has responsibility for the registration regime and for carrier licences. The registration regime comprises firearms registrations.

The Registrar of Firearms maintains records of over 900,000 restricted and prohibited firearms and, pending the decision of the Supreme Court of Canada, continues to maintain records of over 1.6 million non-restricted firearms for individuals and businesses in the province of Quebec only.

- 3 -

The *Firearms Act* and regulations refer to the Canadian Firearms Registry and specify what records are held in the Canadian Firearms Registry.

The Canadian Firearms Registry records in CFIS contain all firearms registration information. There will not be any Canadian Firearms Registry records for the holder of a firearms licence, unless the holder has had some interaction with the CFP, e.g., applied for a registration certificate.

#### Data fields

The data fields in the CFIS for firearm information are the same for firearms, which are restricted, prohibited or non-restricted.

To explain:

While the OIC investigator may have viewed fields within the CFIS screens, the registration data in CFIS is, except for Quebec, for restricted and prohibited firearms only. For individuals and businesses in Quebec, there is registration data in the CFIS for non-restricted firearms. Example: The OIC investigator viewed a CFIS field called "Registration Certificate Number." The data remaining in this field is associated only with a registration certificate for a restricted or prohibited firearm (or a non-restricted firearm for a resident of Quebec).

All scanned images of registration applications in the CFIS that were associated with non-Quebec, non-restricted firearm registration records were destroyed in October 2012.

Your preliminary findings referred to fields viewed by your investigator on his visit to view the CFIS. You will find enclosed as Appendix "A" a list of those fields. Please find in green those fields in which any data stored within the CFIS would only be for firearms with a classification of restricted, prohibited or non-restricted for residents of Quebec. You will find highlighted in red the data fields in the CFIS of individual information which is collected as a result of the licensing regime, not the registration of firearms.

The RCMP can in no way recreate the destroyed records pertaining to non-restricted firearms.

#### Processing of ATIP requests

Upon receiving a request, the ATIP analyst must review the information being requested. Because the processing of ATIP requests relating to data contained within the CFIS is complicated and time-consuming, the ATIP analyst then

contacts the CFP and the Chief Information Officer (CIO) Sector to develop the requirements to extract the data from a live relational database. The CIO then creates an algorithm to extract the non-exempt information (personal information) responsive to the request. Normal business processes require at least two weeks for the algorithm to be written. Subsequent to the extraction of data from the CFIS, the RCMP ATIP section reviews the information line by line to ensure that no exempt information, such as personal information, is included in the release package. Depending on the volume of data involved, this process can be extremely time-consuming.

**Request A-2012-0085**

I provide below an abbreviated summary of the key steps in the processing of Request A-2012-0085.

Request A-2012-0085 was received on March 27, 2012 for:

- a) all records and files relating to the registration of firearms other than prohibited firearms or restricted firearms in the Canadian registry of firearms and reporting to the Commissioner of Firearms; and
- b) all records and files relating to the registration of firearms other than prohibited firearms or restricted firearms that are under the control of each Chief Firearms Officer (CFO).

The response package to another request which was processed by RCMP ATIP, to wit, request A-2012-00183 contained all registration records (minus personal information) for all classes of firearms (prohibited, restricted and non-restricted) registered in Canada up to April 22, 2012. The exact wording was for "an updated copy of the Canadian Firearms Information System (the gun registry database) to include all information within the registry from its inception until the current date based on the information released in 2006 to the Ottawa Citizen-Specifically requesting: Postal Code information limited to the first two characters of the postal code—all fields not containing personal information be released including, but not restricted to the make, model and manufacturer of the firearms, the type (restricted, prohibited, etc.) the action (single shot, semi-automatic, etc.) the caliber, shots, barrel, registration date, province, client (individual, business, etc) and reported (lost, stolen, recovered etc.)."

The *Ending the Long-gun Registry Act* came into force on April 5, 2012; as of this date, the registration of long guns ceased in every province but Quebec.

However, as is set out in your letter, on July 5, 2012, the RCMP notified the complainant that \$1,150.00 would be applied in fees to process this request.

- 5 -

As per section 11(4) of the *Access to Information Act*, "Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request of a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure."

Until the issue of fees is settled, a request has not crystallized, and the search and production of the records will not be actioned. This is necessary, as many requests are abandoned due to an unwillingness to pay the fees.

As you are aware, the requestor in A-2012-0085 did in fact abandon the initial request, as the RCMP was informed at 12:58 p.m. on October 25, 2012, by Investigator Ghyslain Ranger of the Office of the Information Commissioner (OIC) that:

"I talk to the complainant in this file. He advised me that he wants access to the RCMP database regarding the gun registry (French wording used by the complainant was: "Je désire avoir accès à la base de données du registre d'armes à feu.") Would that be easier for the RCMP to process? I look at the "proactive disclosure" on ATIP request and think that what he is now requesting would be similar to requests A-2012-01254 and A-2012-00183. I am correct? Please let me know as quickly as possible."

On October 25, 2012, the requestor sought a new request, and the OIC investigator specifically noted that this request was similar to that of **A-2012-00183**.

In fact, again on November 9, 2012, the same OIC investigator asked:

"Any news regarding this file? Would the two records for the previous request also respond to this request (A-2012-01254 AND A-2012-00183)?"

The RCMP ATIP personnel understood these comments from the OIC as being agreement that A-2012-00183 was responsive to A-2012-0085. In addition, this made sense, as request A-2012-00183 was broader than request A-2012-0085. Any information released for request A-2012-00183 would necessarily include releasable/non-exempt information responsive to request A-2012-0085.

On November 29, 2012, the RCMP ATIP notified the OIC investigator that:

"I have ordered the admin file for A-2012-00183 in order to burn another release CD to send to the requester. Do you require a copy at your end."

.../6

- 6 -

The RCMP used the information gathered for request A-2012-00183 to respond to request A-2012-0085, as the RCMP was in part relying on representations from the OIC and was open and transparent in its response to the request.

It was not until January 7, 2013, that the OIC first indicated that A-2012-00183 would not be responsive to A-2012-0085. The information relating to non-restricted firearms outside of Quebec had by that time been deleted. The deletion occurred as of October 26, 2012, at 00:01.

### **Efforts to preserve records**

With respect to our efforts to preserve the records as requested in your letter of April 13, 2012, let me assure you that the RCMP took steps to ensure that the requestor's access under section 4 of the Act was met.

The *Ending the Lon-gun Registry Act* required the Commissioner of Firearms to destroy as soon as feasible all non-restricted firearms records and copies of those records under his control.

To ensure that all requests received before the destruction could be facilitated, RCMP ATIP maintained a copy of the response package to request **A-2012-00183**, which contained all non-exempt registration records for all classes of firearms (prohibited, restricted and non-restricted) registered in Canada up to April 22, 2012.

While the original request, A-2012-0085, was never actioned (as the issue of fees was not resolved until after the deletion of records relating to non-restricted firearms), the RCMP is of the position that the requestor did receive the information to which they were entitled.

### **Re-processing the records**

Finally, you have suggested that the RCMP has an obligation to re-process the remaining records relating to non-restricted firearms within the CFIS. I find this request unusual, as the RCMP has already processed the complainant's request. The RCMP takes the position that it does not have an ongoing obligation to re-process the request. The complainant has already received the records relating to non-restricted firearms for Quebec residents within the disclosure package of A-2012-00183. However, should the complainant submit a request for the registration records of non-restricted firearms enumerating the fields within the CFIS for which they would like to receive information, the RCMP would be pleased to process such a request.

.../7

- 7 -

**Assurances that the RCMP will preserve all of the remaining records relating to non-restricted firearms within the CFIS and steps taken**

The RCMP Commissioner has already provided his assurances that if for any reason, the *Ending the Long-gun Registry Act* or the impending Supreme Court of Canada decision would necessitate that the Commissioner of Firearms destroy the non-restricted firearms records relating to the province of Quebec, he will, prior to destruction, require that the RCMP's CIO Sector hold for RCMP ATIP a copy of the final backup of the CFIS to permit the OIC to complete their investigation and for any related court requirements.

I trust that the foregoing information is satisfactory.

Yours sincerely,

*Rennie Marcoux, A/lecom R.*

*For* Rennie Marcoux  
Chief Strategic Policy and Planning Officer

## APPENDIX "A"

- Registration Certificate Number
- FIN (Firearm Identification Number)
- Local File Number
- Last Name
- First Name
- Middle Name
- Date of Birth
- Residence Address
  - o Street #
  - o Name/Land Location
  - o Type
  - o Direction
  - o Apt # / Unit
  - o City
  - o Province
  - o Country
  - o Postal Code
  - o Mode of Delivery
  - o #
  - o Installation Type
  - o Installation Area
    - Mailing Address
  - o Street #
  - o Name/Land Location
  - o Type
  - o Direction
  - o Apt # / Unit
  - o City
  - o Province
  - o Country
  - o Postal Code
  - o Mode of Delivery
  - o #
  - o Installation Type
  - o Installation Area
    - Day Telephone
  - o Ext
    - Evening Telephone
  - o Ext
    - Frame or Receiver
    - Registrar Review Required
    - Make
    - Type

- Action
- Gauge/Caliber
- Shots
- Barrel Length
- Serial Number
- No Serial Number
- Model
- Manufacturer
- Importer Distributor
- Manufactured before 1898
- One of matched pair
- Sticker
- Engraving/Stamping
- Acquisition Reason
- Purpose
- Verifier No.
- Last Name
- First Name
- Verifier Signed Indicator
- Date of Verification
  - Place of Registration
- Same as Residence Address
- Street #
- Name
- Type
- Direction
- Apt #/ Unit
- PO Box
- RR #
- City
- Province State
- Country
- Postal / Zip Code
- Application ID
- Application Type
  - New/ Renewal or change
- English / French
- Aboriginal
- Sustenance Hunter
- Province of Issue
- Province of Use
- Application Error
- Severity
- Error Description
- Page
- Application Exceptions

- o Exception Type
- o Exception Remark
- o Addressed
  - Application Status History
  - Comments
  - User
  - Date
  - Correspondence List
- o Notice
- o Notice Date
- o Recipient Name
- o Recipient Address
- o Return Address
  - Payment Endorsed
  - Application Form is a photocopy
  - Application is frivolous
  - Front page is present
  - Funds are in « Canadian » or other acceptable funds, or not applicable
  - Change included, but information not provided
  - Same name and Licence appear on all schedules
  - Applicant declaration is signed

**Pages 341 to / à 344  
are not relevant  
sont non pertinentes**



Department of Justice  
Canada

Ministère de la Justice  
Canada

MEMORANDUM / NOTE DE SERVICE

Security classification -- Côte de sécurité

**PROTECTED-SOLICITOR CLIENT-  
PRIVILEGE**

File number -- Numéro de dossier

Date

April 27, 2015

Telephone / FAX – Téléphone / Télécopieur

**TO / DEST:** Kathy Thompson, ADM Public Safety  
Rennie Marcoux , Chief Strategic Policy & Planning Officer RCMP  
Peter Henschel, Deputy Commissioner RCMP

**VIA:** Elisabeth Eid, ADAG PSDI

s.21(1)(a)

s.21(1)(b)

**FROM / ORIG:** Caroline Fobes, A/Executive Director, PS Legal  
Lilana Longo, Executive Director, RCMP Legal

s.23

**SUBJECT /  
OBJET:**

Comments/Remarques

Do not write in this space / Ne pas écrire dans cet espace

**Pages 346 to / à 347  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 348  
is not relevant  
est non pertinente**

**Today's News / Actualités**  
**May 13, 2015 / le 13 mai 2015**  
**8:00 - 14:00 ET**

This collection contains news items that appeared online between 8:00 a.m. and 2:00 p.m., Eastern Time.  
Ce recueil contient des actualités qui ont paru sur Internet entre 8h00 et 14h00, heure de l'Est.

Today's News can also be accessed through [Newsdesk](#) / Les Actualités peut également être accédée via  
[InfoMédia](#)

**MINISTER / MINISTRE**

**EMERGENCY MANAGEMENT / GESTION DES MESURES D'URGENCE**

**NATIONAL SECURITY / SÉCURITÉ NATIONALE**

**BORDER SECURITY / SÉCURITÉ FRONTALIÈRE**

**CYBER SECURITY / SÉCURITÉ CYBERNÉTIQUE**

**LAW ENFORCEMENT / APPLICATION DE LA LOI**

**CORRECTIONAL SERVICES / SERVICE CORRECTIONNEL**

**COMMUNITY SAFETY & PARTNERSHIPS / SÉCURITÉ DE LA POPULATION ET PARTENARIATS**

**PUBLIC SERVICE / FONCTION PUBLIQUE**

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**SOCIAL MEDIA / MÉDIAS SOCIAUX**

**MINISTER / MINISTRE**

**Omnibus budget bill rewrites history to clear RCMP of potential criminal charges**

The Harper government moved to retroactively rewrite Canada's access to information law in order to prevent possible criminal charges against the RCMP, The Canadian Press has learned. An unheralded change buried in last week's 167-page omnibus budget bill exempted all records from the defunct long-gun registry, and also any "request, complaint, investigation, application, judicial review, appeal or other proceeding under the Access to Information Act or the Privacy Act," related to those old records. The unprecedented, retroactive changes — access to information experts liken them to erasing the national memory — are even more odd because they are backdated to the day the Conservatives introduced legislation to kill the gun registry, not to when the bill received royal assent. The date effectively alters history to make an old government bill come into force months before it was actually passed by Parliament. A source familiar with the complaint, speaking on condition of anonymity due to the sensitivity of the issue, said the government moved out of concern Information Commissioner Suzanne Legault is poised to recommend charges against the Mounties for withholding, and later destroying, gun registry documents while the legislation was still being debated. The government feels no one should face a penalty for being overly eager to enforce the will of Parliament before the legislation had been voted into law. A spokesman for **Public Safety Minister Steven Blaney** would only say the retroactive law will fix a "*bureaucratic loophole*" that allowed citizens to request heavily redacted copies of the gun registry data

while the legislation to destroy the data was before Parliament. "***This clearly goes against the will of Parliament that all copies of the registry should be destroyed***," spokesman Jeremy Laurin said in an email response. "***This technical amendment re-enforces this point.***" [Ipolitics.ca](#) (Winnipeg Free Press, Chronicle Herald)

*Broadcast media / Médias télédiffusés :*

**Minister of Public Safety and Emergency Preparedness, Steven Blaney** was interviewed about limiting pardons for serious crimes and faster removal of foreign criminals. (CKFR-AM 1150-Kelowna, 6h49 PT)

## **EMERGENCY MANAGEMENT / GESTION DES MESURES D'URGENCE**

### **Out-of-control B.C. wildfire growing as crews attempt to contain blaze**

A rapidly spreading wildfire in northern British Columbia has nearly doubled in size in a matter of days. The blaze had grown to engulf an estimated 45 square kilometres of land near Norman Lake by Wednesday morning. The fire has forced dozens of people from their homes since it was first discovered about 50 kilometres southwest of Prince George on Saturday. More than 100 firefighters, numerous helicopters and heavy equipment crews have been working around the clock in attempt to get the blaze under control. [Canadian Press \(CTV Vancouver\)](#)

### **Crews try to control spreading flames of wildfire near Prince George**

A wildfire blazing near Prince George continues to grow as firefighters struggle to bring it under control. The flames from the Little Bobtail Lake fire had spread to cover 4,500 hectares by Tuesday night, and crews have yet to make any progress on containing it. About 80 people have been ordered to evacuate their homes because of the fire, located about 50 km southwest of Prince George. A total of 120 firefighters, six helicopters and eight pieces of heavy equipment are involved in fighting the fire. [Canadian Press \(Vancouver Sun\)](#)

### **Cent wagons de pétrole, cinq fois la bombe d'Hiroshima**

Chaque jour, environ 100 000 barils de pétrole brut transitent par Montréal par chemin de fer. Ces convois pétroliers, dont la longueur peut dépasser un kilomètre et une centaine de wagons-citernes, traversent des quartiers densément peuplés avant de continuer leur route vers le Bas du fleuve ou l'Estrie. Bien que l'attention du public se soit quelque peu relâchée, il n'est pas exagéré de dire que de véritables « bombes roulantes » traversent nos villes. La terrible tragédie de Lac-Mégantic n'est qu'un pâle reflet de ce qui pourrait arriver en milieu urbain. [Voir.ca](#)

## **NATIONAL SECURITY / SÉCURITÉ NATIONALE**

### **Anti-terror bill raises questions about rights**

The passage of Bill C-51 by the House of Commons last week has raised questions for a St. Albert woman about the condition of her rights. Claudette McGee, who is national vice-president for Alberta, the Northwest Territories and Nunavut for the Canada Employment and Immigration Union component of the Public Service Alliance of Canada, is worried about the impact of the bill on protests. "Myself personally and as a union leader, I am deeply concerned with Bill C-51 because we've lost some of our fundamental freedoms," she said. Bill C-51, the Anti-terrorism Act, was proposed by the governing Conservatives and supported by the Liberals. The bill grants expanded powers to the Canadian Security Intelligence Services (CSIS) amongst other items meant to help fight terrorism, but has garnered criticism across the country from those who believe it erodes Canadians' rights and freedoms. McGee said it reminds her of George Orwell's dystopian novel, 1984. "Big Brother is now watching us. And I say shame on the Conservatives and shame on the Liberals for going ahead and putting this through. It smacks of the Patriot Act in the U.S.," McGee said. She's worried that if unions strike, or have peaceful protests, that they'll be watched or considered to be an unlawful assembly. [St. Albert Gazette](#)

## BORDER SECURITY / SÉCURITÉ FRONTALIÈRE

### Welcome to the TFSA bridge to Michigan, and Wednesday's other reasons to fear for humanity

An opinion piece states, "Stephen Harper is due in Windsor today to announce the name for the new \$2 billion bridge across the Detroit River. You can bet it won't be the Herb Grey Bridge, though it's connected to the Herb Grey Parkway. Will it be some dopey cross-border nicey-nice name - the Friendship Bridge, the Peace Bridge Deux? - or some calculating, self-serving Tory bridge - Canada's Economic Action Plan Bridge, the Universal Child Care benefit Bridge..." [National Post](#)

### Migrant sex workers caught up in Ottawa sting facing deportation, further exploitation

Eleven migrant sex workers have been re-victimized after an anti-trafficking investigation of 20 Ottawa massage and body rub parlours lead to the detainment of undocumented women who are now facing deportation, an advocate says. "It's extremely disturbing," says Emily Symons of POWER, an Ottawa sex workers' advocacy group. Deporting the women is exactly what makes migrant sex workers vulnerable to violence and exploitation. The detained women, who worked illegally in Canada with no rights or protections, will be sent back to their home countries where they will likely face severe poverty and abuse. "Deporting the women is exactly what makes migrant sex workers vulnerable to violence and exploitation," Symons says. "They aren't able to come forward to police when they're a victim of a crime - if they're in an abusive situation - because there's a threat of deportation." There's been a surge in arrests across Canada related to sex trafficking and other crimes against sex workers. Last month, a series of raids in cities from Halifax to Vancouver lead to eight arrests related to smuggling some 500 Asian women into Canada to participate in a country-wide prostitution ring. The women involved reported that they came to Canada and entered the sex trade willingly, but they didn't anticipate they'd be working under such poor conditions. Many were sent back to China and Korea. [National Post](#)

## CYBER SECURITY / SÉCURITÉ CYBERNÉTIQUE

### ISIS sympathizers threaten 'electronic war'

The United States, Europe and Australia will face an "electronic war" from ISIS, Web users claiming affiliation with the group claimed this week. A subtitled propaganda video posted on YouTube showed a hooded figure with a masked voice saying that ISIS already has access to "American leadership," but offered no evidence for this claim. The group identified itself as the Islamic State's Defenders in the Internet, but the video did not contain typical hallmarks of an official ISIS video, such as the group's insignia. [The Hill](#)

### Cyber Threats Will Keep Coming if Public and Private Sectors Don't Collaborate, Says DHS Cyber Exec

Public-private partnerships are the key to robust national cybersecurity, according to Peter Fonash, chief technology officer for the Department of Homeland Security's Cybersecurity and Communications Office. Still, they're unlikely to happen until both sectors can communicate better. Cyber breaches have been getting worse over the years, Fonash said during a recent conference in Washington, D.C. He referenced two key statistics from a recent Verizon Data Breach Investigation Report that shows two particular trend-lines between 2004 and 2013: one for the percent of time that compromising a system took a day or less, and another, much lower, for the percent of time that the discovery of breaches took a day or less.

[Nextgov](#)

### Gulf leaders want cyber-security cooperation with US

Gulf heads of state are planning to push US President Barack Obama for increased cyber-security co-operation when they meet in Maryland, US tomorrow, according to reports. Leaders and delegates from the Gulf Cooperation Council, which comprises Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, are due to visit the White House today before attending a summit at the presidential retreat Camp David on Thursday. [SC Magazine](#)

### **Former fed charged in spear-phishing attempt on colleagues**

A former Energy Department and Nuclear Regulatory Commission employee was charged with targeting his former colleagues in a spear-phishing cyberattack intended to plant malware on federal systems to siphon nuclear secrets to sell to a foreign country. [Federal Times](#)

## **LAW ENFORCEMENT / APPLICATION DE LA LOI**

### **Omnibus budget bill rewrites history to clear RCMP of potential criminal charges**

The Harper government moved to retroactively rewrite Canada's access to information law in order to prevent possible criminal charges against the RCMP, The Canadian Press has learned. An unheralded change buried in last week's 167-page omnibus budget bill exempted all records from the defunct long-gun registry, and also any "request, complaint, investigation, application, judicial review, appeal or other proceeding under the Access to Information Act or the Privacy Act," related to those old records. The unprecedented, retroactive changes — access to information experts liken them to erasing the national memory — are even more odd because they are backdated to the day the Conservatives introduced legislation to kill the gun registry, not to when the bill received royal assent. [Canadian Press](#) (Winnipeg Free Press, Metro News, Niagara This Week, iPolitics, Huffington Post)

### **Nelson RCMP ask for public assistance in find missing man near Beasley**

Nelson RCMP is asking of public assistance to find man last seen in the Beasley area, 15 kilometers west of Nelson on Highway 3A Monday, at 9 p.m., Nelson RCMP received a report of a missing person, John Nichols, age 21. Nichols arrived at a residence on Awesome View Rd in Beasley on Tuesday (May 5) to drop a friend off and decided to stay for a few days himself. The last time Nichols was seen though was on the morning of Friday (May 8). Friends believe Nichols must have left on foot because his effects, bike and personal belongings were all left behind in his vehicle. Nichols did not say anything about leaving or going anywhere so a direction of travel is unknown at this time. [Boundary Sentinel](#)

### **Police watchdog called in after Mountie shoots man in Burnaby**

British Columbia's police watchdog is investigating after a man was shot by a Mountie in Burnaby. Kellie Kilpatrick of the Independent Investigations Office of B.C. says the incident happened at about 1:45 a.m. Wednesday. RCMP say officers were responding to a call about an intruder at a home who possibly had a knife. Mounties say when they arrived, they were confronted by a man who would not comply with directions and an officer shot him. The man was taken to hospital with what police say appeared to be non-life-threatening injuries. No other injuries were reported. [Canadian Press](#) (The Province, Metro News); [Van City Buzz](#)

### **Bad romance: Annapolis Valley woman defrauded by man she met on dating site**

Lonely people are vulnerable, a Kings County women learned recently after she was defrauded in a romance scam. The woman sent several thousand dollars and revealed her personal identification to a male she had met on an Internet dating site. RCMP investigators are looking into the case, Const. Kelli Gaudet said. The loss was reported on May 7. Last month, CBC reported a Brantford, Ont. senior lost about \$400,000 in a romance fraud that took place over a 12-month period. In 2013, a retired British Columbian woman was duped of \$1.3 million. Typically, the so-called relationship develops through an instant messaging (IM) forum. The monies in the Ontario case were sent to two different foreign countries. [Nova News Now](#)

### **Teresa Robinson apparent mauling death: RCMP speaks on Garden Hill girl's case**

RCMP in Manitoba are speaking publicly for the first time about its investigation into the death of Teresa Cassandra Robinson, the 11-year-old believed to have been mauled by an animal on a First Nation. Chief Supt. Scott Kolody is talking about the investigation starting this hour at the Manitoba RCMP headquarters in Winnipeg. CBC News is livestreaming the news conference here. Cassandra's body was found on Monday at the Garden Hill First Nation. She had been missing a week. Community members have said they believe she was attacked by some kind of animal, possibly a bear. RCMP have only confirmed they were investigating the death of a girl on the reserve, located about 500 kilometres northeast of Winnipeg. [CBC News](#); [Global News](#)

### **RCMP called after Ridgewood Road resident deals with bear inside home**

Nelson RCMP said a Ridgewood Road homeowner experienced a rude awakening Tuesday night after a black bear entered the residence located five kilometers north of the Heritage City on the North Shore. Cpl. Michael Stefani of the Nelson RCMP said police dispatch received a call from the resident at 11 p.m. Tuesday of rustling inside the home. "Upon getting up and looking out his bedroom door a black bear was seen looking at him from around a corner in the kitchen area down the hall," Cpl. Stefani explained in the media release. "The homeowner was able to climb out a window and call police." "The animal was described as a small black bear cub," Stefani added. Cpl. Stefani said after walking around the side of the house to the deck, he was also met by what looked like a mother black bear approximately 10 feet away. He was able to scare off the bear. [Castlegar Source](#)

### **Colis suspect dans un immeuble abritant les Forces armées**

La découverte d'un colis suspect a causé tout un branle-bas le combat mercredi matin, sur le Plateau-Mont-Royal, à Montréal. Vers 10h, la police a été alertée de la présence d'un colis suspect devant un bâtiment situé rue De Bullion à l'angle du boulevard Saint-Joseph. L'immeuble abrite un local administratif des Forces armées canadiennes. Un large périmètre de sécurité a été mis en place dans le secteur, et le groupe technique d'intervention a été appelé sur les lieux afin de déterminer le contenu du colis. Celui-ci a été neutralisé peu après 11h15. [Agence QMI \(TVA Nouvelles\)](#)

*Broadcast media / Médias télédiffusés :*

CBC News provides live coverage of a press conference by the RCMP Chief Superintendent in Winnipeg on the death of Teresa Robinson. [Rough transcript](#)

## **CORRECTIONAL SERVICES / SERVICE CORRECTIONNEL**

### **Body found near Quebec City is missing woman Chantal Demers**

Quebec City police have confirmed that a body found in a wooded area in the Portneuf region is that of Chantal Demers, a 46-year-old woman who disappeared May 3. An autopsy has been ordered to determine the cause of death. On Friday, 47-year-old Lac-Saint-Charles resident Victor Poirier was arrested. He is suspected of being the last person to have seen her. He is charged with assaulting Demers in incidents alleged to have happened in April, and with parole violations. He will remain in custody at least until a court appearance Thursday. The body was found near the place Poirier was arrested. [Montreal Gazette](#)

### **Officials make drug seizure at Dorchester Penitentiary**

On May 7, 2015, correctional officers in the medium security unit at Dorchester Penitentiary intercepted an inmate who was attempting to bring contraband into the institution. This seizure is the result of the combined efforts of correctional officers and security intelligence officers. The contraband seized includes hashish, hashish oil and hydromorphone beads. The total institutional value of this seizure is estimated at \$7,228.00. The police have been notified and the institution is investigating. The Correctional Service of Canada (CSC) uses a number of tools to prevent drugs from entering its institutions. [Sackville Tribune Post](#)

## **COMMUNITY SAFETY & PARTNERSHIPS / SÉCURITÉ DE LA POPULATION ET PARTENARIATS**

### **MMIW case in Brandon still unsolved, family speaks out for 1st time**

They have never spoken out about their mother before, but after seeing CBC's coverage of the unsolved cases of murdered and missing indigenous women in Canada, siblings Jeremy and Anna Hanska wanted Diana Rattlesnake's story to be told. (...) Rattlesnake's murder went relatively unnoticed in Brandon, Man. Anna said there were only a few mentions in the local newspaper. Her brother, Jeremy, has a theory

about why there wasn't more coverage. "Probably because she's aboriginal, and she had her demons, and they just saw her as a statistic and not as a human being," Jeremy said. [CBC News](#)

## PUBLIC SERVICE / FONCTION PUBLIQUE

*NIL*

## OTHER / AUTRES

*NIL*

## INTERNATIONAL

*NIL*

## SOCIAL MEDIA / MÉDIAS SOCIAUX

[Twitter](#)

### EMERGENCY MANAGEMENT / GESTION DES MESURES D'URGENCE

[VancouverSun](#)

Crews try to control spreading flames of wildfire near Prince George [ow.ly/2YA7IV](http://ow.ly/2YA7IV)

### NATIONAL SECURITY / SÉCURITÉ NATIONALE

[CityNews](#)

Mental health of man convicted in Via train terror plot 'real issue': lawyer [ow.ly/MUlqE](http://ow.ly/MUlqE)

[globeandmail](#)

Mental health of man convicted in Via train terror plot 'real issue': lawyer [trib.al/8jDgzlc](http://trib.al/8jDgzlc)

### BORDER SECURITY / SÉCURITÉ FRONTALIÈRE

[CanBorder](#)

CBSA officers find suspected opium at Hamilton International Airport [news.gc.ca/web/article-en...](http://news.gc.ca/web/article-en...)

### LAW ENFORCEMENT / APPLICATION DE LA LOI

[CKNW](#)

UPDATED: Man shot after failing to do what [#Burnaby](#) RCMP told him, @jiobc says. [bit.ly/1L1NXse](http://bit.ly/1L1NXse)

[theprovince](#)

Police watchdog called in after Mountie shoots man in Burnaby [theprov.in/1KJtPdx](http://theprov.in/1KJtPdx)

[nathancullen](#)

Con MPs vote AGAINST Speaker of House who had agreed w us about sacred right of MPs being able 2 vote. What!

[#cdnpoli](#)

[cbc.ca/news/politics/...](http://cbc.ca/news/politics/...)

[tvanouvelles](#)

Plateau-Mont-Royal - Colis suspect dans un local abritant les Forces armées [bit.ly/1AWQ7mW](http://bit.ly/1AWQ7mW)

CBCManitoba

Teresa Robinson apparent mauling death: RCMP to speak on Garden Hill girl's case [cbc.ca/news/canada/ma...](http://cbc.ca/news/canada/ma...)

globalwinnipeg

LIVE NOW: #Manitoba RCMP talk about death of Teresa Robinson, 11, on Garden Hill First Nation [glbn.ca/MU1NB](http://glbn.ca/MU1NB) [pic.twitter.com/Owyj0rtJsR](http://pic.twitter.com/Owyj0rtJsR)

globalwinnipeg

RCMP say cause of Garden Hill girl's death still unconfirmed [glbn.ca/MU1NB](http://glbn.ca/MU1NB) [pic.twitter.com/PWnKeXtXg6](http://pic.twitter.com/PWnKeXtXg6)

CTVNews

Cause of girl's death on remote Manitoba reserve not yet clear: RCMP [ow.ly/MUK4I](http://ow.ly/MUK4I)

HeatherWellsCBC

RCMP not ruling out homicide in death of 11-yr old Garden Hill FN girl. Teresa Robinson found Mon. Homicide investigators now in community.

BChadle

Well, well. Information commissioner announces special report on gun registry data investigation to be tabled Thursday.

chronicleherald

Omnibus budget bill rewrites history to clear RCMP of potential criminal charges [herald.ca/qiu#.VVNwN8wdg...](http://herald.ca/qiu#.VVNwN8wdg...) [#cdnpoli](http://#cdnpoli)

**COMMUNITY SAFETY & PARTNERSHIPS / SÉCURITÉ DE LA POPULATION ET PARTENARIATS**

nationalpost

Special investigation: How union rules help perpetuate criminal influence on Vancouver docks [natpo.st/1cTiTzN](http://natpo.st/1cTiTzN)

**PUBLIC SERVICE / FONCTION PUBLIQUE**

GlobalNational

Conservatives plan for eight hours of committee hearings on budget bill [glbn.ca/MTj9o](http://glbn.ca/MTj9o) [#cdnpoli](http://#cdnpoli)

**OTHER / AUTRES**

PostmediaWire

No Canadians believed to be on board the Amtrak train that derailed in Philadelphia: Foreign affairs

**INTERNATIONAL**

StewartBellINP

Canada conducted air strike Wed near Tal Afar, where ISIL acting leader reportedly killed. [nbcnews.to/1cwOCWF](http://nbcnews.to/1cwOCWF)

CBCAlerts

7th person dead in [#AmtrakDerailment](http://#AmtrakDerailment) in [#Philadelphia](http://#Philadelphia). Local reports quote police, fire department sources.

*Prepared by the Public Safety Portfolio Media Centre / Préparé par le Centre des médias du portefeuille Sécurité publique. We can be reached at / Vous pouvez nous contacter à:  
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**Page 356  
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est non pertinente**

Court File No.: T-785-15

**FEDERAL COURT**

BETWEEN:

**THE INFORMATION COMMISSIONER OF CANADA**

Applicant  
(Moving Party)

- and -

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondent

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**MOTION RECORD OF THE INFORMATION COMMISSIONER OF CANADA**

*(Motion For An Order Preventing The Destruction  
Of The Records In Issue In This Application)*

**VOLUME 3**

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Court File No.: T-785-15

FEDERAL COURT

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Applicant  
(Moving Party)

- and -

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

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MEMORANDUM OF FACT AND LAW  
(*Motion For An Order Preventing The Destruction  
Of The Record In Issue In This Application*)

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## PART I – STATEMENT OF FACTS

### I. OVERVIEW

1. The Information Commissioner of Canada seeks an Order pursuant to either Rule 373(1) or Rule 377 of the *Federal Courts Rules* requiring the Respondent to deliver the record in issue in this access to information Application to the Registry of the Federal Court which shall be filed with the Registry as a confidential record until the final disposition of this Application (and all other appeals have been exhausted) or the Court orders otherwise.
2. Unless the Order requested in this motion is granted, the record in issue in this Application will be destroyed by the Respondent as soon as sections 230-231 of Bill C-59 (amendments to the *Ending the Long-gun Registry Act*) receive Royal Assent. Bill C-59 is expected to enter into force during the month of June, 2015 before Parliament rises for the summer recess.
3. The record in issue in this Application is a back-up copy of long-gun registry information from the Canadian Firearms Registry relating to residents of the Province of Quebec. The back-up copy is a remnant of the long-gun registry information that is the subject of the access to information Request in issue in this Application. There is only one copy of the record in issue in existence today.
4. Based upon the history of the destruction of long gun registry information by the Respondent, as soon as sections 230-231 of Bill C-59 enter into force, the Respondent will permanently destroy the record in issue.
5. The test for obtaining the Orders sought either by way of interlocutory injunction (Rule 373) or preservation (Rule 377) is the three part test in *RJR MacDonald Inc. v. Canada*, [1994] 1 SCR 311. There is a serious issue to be tried in this Application. There is irreparable harm if the record in issue is permanently destroyed prior to the final determination of this Application. The balance of convenience favours the Information Commissioner pending the hearing of this Application.
6. Without the Order sought in this Motion, the sole existing record of long-gun registry information sought by the Complainant through this Application will be permanently destroyed and that information can never be restored or recreated.

**II. FACTS**

**A. THE ACCESS TO INFORMATION ACT REQUEST FOR LONG-GUN REGISTRY INFORMATION**

7. On March 27, 2012, the RCMP received the following access to information Request:

An electronic copy of: a) all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and are under the control of the Commissioner of Firearms; and b) all records related to the registration of firearms that are neither prohibited firearms nor restricted firearms that are under the control of each chief firearms officer. [translated]

**Affidavit of Neil O'Brien, Exhibit "A"**

8. The Requester/Complainant, Bill Clennett ("the Complainant"), sought access under the *Access to Information Act* to all long-gun registry information for all of Canada. The language of the Request mirrors the language of section 29 of the *Ending the Long-gun Registry Act* which entered into force on April 5, 2012, ten days after the Complainant filed his access to information Request.

9. The Requester's first complaint to the Information Commissioner regarding the fees that the RCMP wanted to charge for processing his Request was received on July 25, 2012. On January 11, 2013, the RCMP provided the Complainant a copy of the same information that it provided to another requester in response to a different access to information Request. The Requester's second complaint regarding records missing from the response he received from the RCMP was dated February 1, 2013.

**B. ASSURANCES PROVIDED BY THE MINISTER TO THE INFORMATION COMMISSIONER THAT LONG-GUN REGISTRY INFORMATION WOULD NOT BE DESTROYED**

10. On April 5, 2012, ten days after the RCMP received the Complainant's access to information Request, the *Ending the Long-gun Registry Act* received Royal Assent. Section 29 required the Commissioner of Firearms to ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms ("long-guns") and all copies of those records.

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11. By letter dated April 13, 2012, the Information Commissioner wrote to the Minister of Public Safety and Emergency Preparedness (at the time, the Honourable Vic Toews) and advised him of her position regarding the impact of section 29 of the *Ending the Long-gun Registry Act* on Requests for information:

"Given the impending coming into force of this new legal requirement, I thought it prudent to write you at this time to alert you to the fact that any records responsive to requests made under the Act prior to coming into force of this provision are subject to the right of access to any records under the control of a government institution recognized by subsection 4(1) of the Act. This is to say that any records under the control of the RCMP, including those under the control of the Commissioner of Firearms and/or the Canadian Firearms Program, for which a request has been received under the Act before the coming into force of subsection 29(1) of the new Act are subject to the right of access and cannot be destroyed until a response has been provided under the Act and any related investigation and court proceedings are completed. This, of course, applies to the records responsive to the above-noted request."

I request that you inform me by **April 30, 2012**, whether you agree not to destroy any records in the Canadian Firearms Registry related to the registration of non-prohibited and non-restricted firearms and that are responsive to requests under the Act received by the RCMP before the coming into force of subsection 29(1) of the new Act."

The Information Commissioner's April 13, 2012 letter was copied to the Commissioner of the RCMP and the RCMP Access to Information and Privacy Coordinator.

**Affidavit of Neil O'Brien, Exhibit "B"**

12. By email sent April 23, 2012 from Hwan Lee to Jeff Hurry, Mr. Lee requested a meeting to "collaborate on a response" to the Information Commissioner's letter. Hand written on a hard copy of this email are the words "Atip will retain requests - 45 days - since request received before Bill C-19". Also hand written on the hard copy of the email are the words "unless ministerial order to destroy".

**Affidavit of Neil O'Brien, Exhibit "C"**

13. By letter dated May 2, 2012, Minister of Public Safety Toews responded to the Information Commissioner's April 13, 2012 letter:

With respect to your question on destruction of records in the CFIS, please be assured that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

A copy of the Minister's response was also sent by the Minister to the RCMP's Coordinator of Access to Information and Privacy.

**Affidavit of Neil O'Brien, Exhibit "D"**

14. An email sent on May 29, 2012 by Pierre Perron (Assistant Commissioner, Director General of the Canadian Firearms Program) to Robert MacKinnon (Director, Firearms Business Improvement, Canadian Firearms Program) states: "Just for the record, the Minister's Office is putting a lot of pressure on me to destroy the records sooner".

**Affidavit of Neil O'Brien, Exhibit "E"**

15. As of the date that the Complainant filed his access to information Request (i.e. March 27, 2012), none of the long-gun registry information in the Canadian Firearms Registry had been destroyed. The Canadian Firearms Registry, in its entirety, existed with long-gun registry data for all of Canada. All of this data was contained in the broader, Canadian Firearms Information System ("CFIS"), which is maintained by the RCMP.
16. On December 17, 2012, the Information Commissioner wrote to Minister Toews and asked about the destruction of long-gun registry information reported by the media:

"I am concerned by recent media coverage that has reported that the long-gun registry, with the exception of registry information related to Quebec, has been destroyed. Among these media accounts is the Canadian Broadcasting Corporation's coverage on November 2, 2012, which reported that your office had confirmed that the long-gun registry was destroyed on November 1, 2012.

Please be advised that the destruction of records responsive to requests made while the information in the long-gun registry was under the control of the RCMP would be contrary to subsection 4(1) and could be in contravention of section 67.1 of the Act.

I therefore request that you inform me by January 14, 2013, whether in fact the government has destroyed records that were under the control of the RCMP as of the date of the request, namely March 27, 2012, or

whether an integral copy of the long-gun registry has been preserved in order to protect the requester's right of access under subsection 4(1) of the Act."

The Information Commissioner's letter of December 17, 2012 was copied to the Commissioner of the RCMP and the RCMP ATIP Coordinator.

**Affidavit of Neil O'Brien, Exhibit "F"**

17. A Briefing Note to the RCMP Commissioner dated January 7, 2013 addresses the response the Minister should send to the Information Commissioner's December 17, 2012 letter: "The RCMP destroyed all records on or about the 31st of October, 2012. Prior to the destruction of all records, the RCMP ATIP Branch secured from the CFP [Canadian Firearms Program] all responsive records for existing requests."

**Affidavit of Neil O'Brien, Exhibit "G"**

18. By letter dated February 5, 2013, in response to the Information Commissioner's letter of December 17, 2012, Minister Toews informed the Information Commissioner that:

"With respect to your question on destruction of records in the CFIS, I am assured by the RCMP Commissioner that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard."

**Affidavit of Neil O'Brien, Exhibit "H"**

19. By letter dated January 19, 2015, the Information Commissioner wrote to the Commissioner of the RCMP to advise him that she had reached the preliminary view based on information gathered during her investigation that the information that the RCMP had provided to the Complainant did not constitute all of the responsive records to his Request. The Information Commissioner also requested assurances from the Commissioner that the RCMP would take steps to ensure that the records she had identified as being responsive to the Request would be preserved:

"Until the completion of this investigation and any related court proceedings I seek, again, your assurance that you will preserve all of the remaining records relating to non-restricted firearms within the CFIS. I ask that you inform me of the steps that you will be taking to ensure that

the RCMP is able to process the request pursuant to section 4 of the Act in accordance with the assurances that were provided to me by the Minister."

**Affidavit of Neil O'Brien, Exhibit "I"**

20. In an email sent February 3, 2015, counsel for the Commissioner of the RCMP (Greg Tzemenakis) advised that the Commissioner of the RCMP agreed that the RCMP would preserve the records that the Information Commissioner considered to be responsive to the Request:

"A copy of the final CFIS back-up will be maintained for the sole purpose of permitting the OIC to complete their investigation and any other related court proceedings, in any eventuality that may result from a decision by the Supreme Court, including but not limited to the requirement to destroy."

**Affidavit of Neil O'Brien, Exhibit "J"**

21. By letter dated February 20, 2015, the Office of the Chief Strategic Policy and Planning Officer on behalf of the Commissioner of the RCMP responded to the Information Commissioner's letter of January 19, 2015, and informed the Information Commissioner:

"The RCMP can in no way recreate the destroyed records pertaining to non-restricted firearms".

**Affidavit of Neil O'Brien, Exhibit "K"**

22. A Briefing Note to the Commissioner of the RCMP dated March 21, 2013 addressed the following issue: "Notify the Commissioner that the RCMP may not have complied with Sec 4(1), *Access to Information Act* in regards to keeping records of the Long Gun Registry". The Briefing Note refers to the two occasions where the Information Commissioner sought assurances that the RCMP would preserve an integral copy of the long-gun registry and/or respect subsection 4(1) of the *Access to Information Act*. The Briefing Note also states: "However, for the purpose of the complaint, the issue at hand is that we did not keep an "integral copy" (all data) of the Long Gun Registry". The Briefing Note has been redacted in several places based on a claim of solicitor-client privilege.

**Affidavit of Neil O'Brien, Exhibit "L"**

C. **THE RCMP'S IMPLEMENTATION PLANS TO DESTROY THE LONG-GUN  
REGISTRY INFORMATION NOTWITHSTANDING THE COMPLAINANT'S  
ACCESS TO INFORMATION ACT REQUEST**

23. The Minister was aware of implementation plans to destroy the long-gun registry information notwithstanding the Complainant's Request and the Information Commissioner's investigation.
24. An email sent on March 22, 2012 from Robert MacKinnon (Director, Firearms Business Improvement) to Scott McDougall (Director, Firearms Management and Strategic Services) says: "As per below MO [Minister's Office] request, I've updated the "Bill C-19 CFP Implementation Plan Summary". The email attaches a March 19, 2012 "Bill C-19 Implementation Plan Summary" which contains a Phase III "execute delete" date of August 1, 2012 to August 31, 2012.

**Affidavit of Neil O'Brien, Exhibit "M"**

25. The RCMP prepared several other "Bill C-19 Implementation Plan Summary" documents, including those dated April 13, 2012, May 5, 2012 and September 24, 2012, all with Phase III "execute delete" dates of October 1, 2012 to October 31, 2012.

**Affidavit of Neil O'Brien, Exhibit "N", "O", "P"**

26. A Briefing Note to the Commissioner of the RCMP dated May 2, 2012 provided a briefing on the Canadian Firearms Program Bill C-19 Implementation Plan "in advance of his meeting with the Minister of Public Safety on May 7, 2012", and attaches the April 13, 2012 "Bill C-19 Implementation Plan Summary". This Briefing Note states that the final completion date for the deletion of the records has been delayed until October 31, 2012 as a result of the Quebec injunction.

**Affidavit of Neil O'Brien, Exhibit "Q"**

27. In an email exchange between Rob MacKinnon and Jacques Laporte (Manager, CFP Applications) on May 3, 2012, Mr. MacKinnon asks: "If we are able to execute the "expire" in May, does that mean we are able to execute the delete in September (over 3 weekends)?" Mr. Laporte's reply in part is: "We need the 5 months". Mr. MacKinnon's

reply in part is: "Understand what you're saying but just so you know, there will be pressure from senior RCMP to move up delete date." Mr. Laporte's reply in part is: "Between you and me someone will owe us lots of drinks at PMO if they want this to happen by end of August."

**Affidavit of Neil O'Brien, Exhibit "R"**

28. A Briefing Note to the Deputy RCMP Commissioner dated October 12, 2012 dealt with the issue of the Canadian Firearms Program on-line and telephone services not being available from October 26 to October 29, 2012 while non-restricted firearms were deleted. An email from Pierre Perron sent on October 18, 2012 to Peter Henschel, Acting Deputy Commissioner, Policing Support Services says that Public Safety: "instructed us to call it a system outage/update. We are to make no reference to C19 or data deletion".

**Affidavit of Neil O'Brien, Exhibit "S", "T"**

29. According to an undated and secret Memorandum For The Minister titled "Implementation of the Ending the Long-gun Registry Act", the permanent destruction of the long-gun registry information (including electronic copies and back-up tapes) would be completed seven months after the coming into force of Bill C-19 (*Ending the Long-gun Registry Act*):

"The following milestone will be completed within seven months of coming into force (by October 31, 2012), instead of five months: Permanent destruction of the long-gun registry, including electronic copies and back-up tapes, completed. The destruction of Quebec-related records, and its timing, will depend on the results of the litigation".

**Affidavit of Neil O'Brien, Exhibit "U"**

30. An email sent by Mark Potter (Director General, Policing Policy, Department of Public Safety) to Pierre Perron on January 20, 2012 states: "...we met w the MO yesterday to update them on the firearms issue...I know that your team is planning for implementation but I wanted to let you know that the MO has expectations that it will be completed quickly".

**Affidavit of Neil O'Brien, Exhibit "V"**

31. An email sent by Pierre Perron to Rob O'Reilly (Executive Assistant to the Deputy Commissioner, Policing Support Services, RCMP) on February 22, 2012 says: "You may want to notify the Commissioner that he may get a call. We have provided numerous implementation plans. The bottom line is that they do not trust that we will be deleting the data as efficiently and swiftly as possible".

**Affidavit of Neil O'Brien, Exhibit "W"**

**D. THE DESTRUCTION OF RECORDS RESPONSIVE TO THE COMPLAINANT'S ACCESS TO INFORMATION REQUEST**

32. Records relating to the Complainant's March 27, 2012 Request were destroyed between October 25, 2012 and October 29, 2012. These records were irretrievably deleted when the back-up was destroyed. Specifically, in October 2012, the RCMP destroyed all long-gun data in the Canadian Firearms Registry, with the exception of those records related to residents of the Province of Quebec (which, at the time, were subject to an Order from the Quebec Superior Court prohibiting their destruction).

33. An email sent by Robert MacKinnon on October 31, 2012 to Pierre Perron confirmed that 605,359,473 rows of long-gun records in the Canadian Firearms Information System were destroyed as were all backup tapes. The email also says: "Totally Done! They are permanently gone."

**Affidavit of Neil O'Brien, Exhibit "Z"**

34. A *Globe and Mail* article, dated November 1, 2012, quoted the then Director of Communications to former Public Safety Minister Vic Toews as saying:

"Our Conservative government is proud to say that as of last night, all contents of the long-gun registry have been destroyed, except those related to Quebec. ...Make no mistake, the tax-and-spend NDP will not hesitate to bring back the long gun registry. Now that these data have been deleted they can never be recovered – even by Thomas Mulcair."

**Affidavit of Neil O'Brien, Exhibit "CC"**

35. RCMP ATIP officer Mark Maidment sent an email on November 2, 2012 to Rachelle Trudel (ATIP Information Management Analyst) asking:

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"Apparently there is a news article today saying that the long-gun registry is now destroyed?!?!?...Is the registry still available for continuing our requests?"

In reply on November 6, 2012, Ms. Trudel advised:

"The RCMP has destroyed its live database of non-restricted firearm records, with the exception of those belonging to Quebec residents, in compliance with the Ending The Long Gun Registry Act."

**Affidavit of Neil O'Brien, Exhibit "DD"**

36. Page 50 of a document entitled "Bill C-19 Implementation Of Data Purge Of Long Gun Data - Test Plan And Results (November 30, 2012-version 7 – Final)". Section 14.3.3 says: "CIO-Sector reported October 31, 2012 at 2:18 that all backup tapes were destroyed including those from National Archives...all the media given to me today by both of you has been destroyed. All tapes have been destroyed (securely shredded)...".

**Affidavit of Neil O'Brien, Exhibit "EE"**

37. On March 27, 2015 the Supreme Court of Canada dismissed an appeal of the Attorney General of Quebec who was attempting to prevent the destruction of the long-gun registry information relating to residents of the Province of Quebec (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14). Radio Canada reported on April 1, 2015 that the Respondent planned to destroy the original live database of records relating to residents of Quebec by April 12, 2015.

**Affidavit of Neil O'Brien, Exhibit "FF"**

38. According to information provided by the RCMP, all electronic records contained in the Canadian Firearms Registry relating to the registration of long-guns have been completely destroyed. The only long-gun registry information that remains in existence today is a single back-up copy of long-gun registry information pertaining to long-guns registered for residents of the province of Quebec (the record at issue in this Application).

E. **THE INFORMATION COMMISSIONER'S FINDINGS AND RECOMMENDATIONS (SECTION 37 ACCESS TO INFORMATION ACT)**

39. By letter dated March 26, 2015, the Information Commissioner wrote to the Minister of Public Safety (the Honourable Steven Blaney), in his capacity as head of the institution responsible for the RCMP, to report the results of her investigation pursuant to section 37 of the *Access to Information Act*.

**Affidavit of Neil O'Brien, Exhibit "GG"**

40. The Information Commissioner concluded that the Complaint was well founded and that the RCMP destroyed records responsive to an access request while the Information Commissioner was seized of a complaint and despite her letter of April 13, 2012 in which she informed the institution of its obligation to preserve the records responsive to existing access to information requests pending the completion of her investigation and all related proceedings.

41. The Information Commissioner recommended that the RCMP process information, that continued to exist, relating to the registration of long-guns in the Province of Quebec, including the scanned images of the registration and transfer applications pertaining to long-guns that still exist within the CFIS database, and disclose this information to the Complainant, subject to any applicable exemptions under the *Access to Information Act*.

42. The Information Commissioner's March 26, 2015 letter also notified both the Minister and the Commissioner of the RCMP that as a result of information gathered during the investigation of the Complainant's complaint, she was of the opinion that an offence, in contravention of section 67.1 of the *Access to Information Act*, may have been committed. The Commissioner advised the Minister and the Commissioner of the RCMP that she intended to refer this matter to the Attorney General of Canada pursuant to subsection 63(2) of the *Access to Information Act*. By letter dated March 26, 2015, the Information Commissioner referred to the Attorney General of Canada, pursuant to subsection 63(2) of the *Access to Information Act*, information relating to the possible commission of an offence under paragraph 67.1(1)(a) of the *Access to Information Act*.

43. By email sent April 2, 2015 at 3:25 p.m. from counsel for the Minister, an extension of 20 days (i.e. until April 30, 2015) was requested by the Minister "to provide a fulsome response as to whether he will implement the proposed recommendations". The email from counsel for the Minister contained the following acknowledgement about the preservation of the records:

"The Minister's Office acknowledges that the RCMP Commissioner has provided assurances, that he would, prior to destruction of the non-restricted firearms records relating to the Province of Quebec, require the RCMP CIO sector hold for the RCMP ATIP a copy of the final backup of the CFIS to permit the OIC to complete their investigation and for any related court proceedings".

**Affidavit of Neil O'Brien, Exhibit "HH"**

The Information Commissioner granted the requested 20 day extension.

44. The Minister's response to the Information Commissioner's section 37 *Access to Information Act* report of findings and recommendations consisted of a two paragraph letter dated April 30, 2015, in which the Minister informed the Information Commissioner that the Requester received the records responsive to the Request and the Minister has no intention of following the Information Commissioner's recommendations that additional information be processed and disclosed to the Requester.

**Affidavit of Neil O'Brien, Exhibit "II"**

45. By letter dated May 12, 2015, the Information Commissioner reported to the Complainant that her investigation had determined that the RCMP had failed to provide him with all of the records, or information therein, that are responsive to his access Request. In particular, the Commissioner found that the RCMP had destroyed responsive records and refused to process and release existing records responsive to his access to information Request.

**Affidavit of Neil O'Brien, Exhibit "JJ"**

46. The Complainant provided the Information Commissioner with his consent to file this Application seeking judicial review pursuant to section 42 of the *Access to Information Act*.

47. On May 13, 2015, the Information Commissioner sent letters to the Speakers of the Senate of Canada and House of Commons and tabled a Special Report with the Parliament of Canada on May 14<sup>th</sup> that addressed her investigation into the complaint regarding the disclosure of information from the Canadian Firearms Registry by the RCMP. Following the tabling of the Special Report, the section 42 Notice of Application in this case was filed on May 14, 2015.

**Affidavit of Neil O'Brien, Exhibit "KK"**

48. On May 20, 2015, counsel for the Office of the Information Commissioner (Nancy Bélanger) sent an email to counsel for the RCMP (Greg Tzemenakis) requesting that the RCMP confirm the physical medium used to store the "final CFIS back-up", referenced in his February 3, 2015 email (attached as Exhibit "J"). On May 22, 2015, Mr. Tzemenakis replied that he was not in a position to provide this information as the matter was pending before the Federal Court.

**Affidavit of Neil O'Brien, Exhibit "MM"**

**F. BILL C-59 – AMENDMENTS TO THE ENDING THE LONG-GUN REGISTRY ACT**

49. Bill C-59 was tabled in the House of Commons and given first reading on Thursday May 7, 2015. Section 230 of Bill C-59 states that, retroactive to October 25, 2011, the *Access to Information Act* does not apply to any records and copies of the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms ("long guns") and all records with respect to its destruction. Bill C-59 further mandates that any "request, complaint, investigation, application, judicial review, appeal or other proceeding under the *Access to Information Act*" in existence on or after October 25, 2011 must be determined in light of the fact that Bill C-59 retroactively excludes the operation of the *Access to Information Act*.

50. Section 231 of Bill C-59 also retroactively shields the Crown, Crown servants and the Commissioner of Firearms (who is the Commissioner of the RCMP) from any administrative, civil or criminal proceedings for non-compliance with the *Access to Information Act* with respect to the destruction of long-gun records from the Canadian Firearms Registry that occurred on or after April 5, 2012.

51. On May 12, 2015, the House of Commons Finance Committee adopted a motion to redirect the study of certain portions of Bill C-59 to other House of Commons committees. Those committees must report back to the House Finance Committee by June 2, 2015 and clause-by-clause consideration of the Bill must take place no later than Thursday, June 4, 2015.

**Affidavit of Neil O'Brien, Exhibit "NN"**

52. Bill C-59 was debated at second reading between May 13 and 15, 2015.

53. On May 13, 2015, the Hon. Peter Van Loan, Leader of the Government in the House of Commons, gave notice that the Government would be introducing a time allocation motion to limit the duration of the debate at second reading. This motion was adopted on May 14, 2015.

**Affidavit of Neil O'Brien, Exhibit "OO"**

54. Also on May 13, 2015, the Senate adopted a motion to commence a pre-study of Bill C-59. This Senate Committee must table their respective reports in the Senate no later than June 4, 2015.

**Affidavit of Neil O'Brien, Exhibit "PP"**

55. On May 25, 2015, Bill C-59 was adopted at Second Reading and referred to the House of Commons Standing Committee on Finance for study. On May 26, 2015, the Finance Committee began its hearings on Bill C-59.

**Affidavit of Neil O'Brien, Exhibit "RR"**

56. A May 27, 2015 Canadian Press story ("Concerns over retroactive law akin to angels on a pin head says Tory Minister") reported that Bill C-59 "will be rammed through Parliament before the summer recess".

**Affidavit of Neil O'Brien, Exhibit "TT"**

57. A *Globe and Mail* story of May 25, 2015 headlined "Tories' life-without-parole bill in limbo" reports Government House Leader Peter Van Loan stating that "the government's

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priority is passing its budget." Bill C-59 will enact the budget. According to the House of Commons calendar, the House of Commons adjourns on June 23, 2015.

**Affidavit of Neil O'Brien, Exhibit "UU"**

## PART II - ISSUES

58. The issues in this motion are whether the Court should grant:

- (i) an Order pursuant to either Rule 373(1) or Rule 377 of the *Federal Courts Rules* requiring the Respondent Minister to deliver the record in issue in this Application to the Registry of the Federal Court which shall be filed with the Registry as a confidential record until the final disposition of this Application (and all other appeals have been exhausted) or the Court orders otherwise.
- (ii) In the alternative, an Order prohibiting the Respondent from destroying the record in issue in this Application until the final disposition of this Application (and all appeals have been exhausted) or the Court orders otherwise.

### PART III – LAW AND ARGUMENT

#### A. GENERAL PRINCIPLES UNDERLYING THE ACCESS TO INFORMATION REGIME

59. The *Access To Information Act* sets out a substantive right of access to requesters, who are to be given access to any record under the control of a government institution upon request, subject only to limited and specific exceptions set out in the *Access To Information Act*. This right of access to government information, which operates notwithstanding any other Act of Parliament, is quasi-constitutional in nature and, in some instances, recognized as a derivative right to the freedom of expression guaranteed pursuant to section 2(b) of the Canadian *Charter of Rights and Freedoms*.

*Sections 2(1) & 4, Access to Information Act, R.S.C., 1985, c. A-1  
Canada (Information Commissioner) v. Canada (Minister of National Defence), [2011] 2 S.C.R. 306 at para. 40 (Tab 1, Book of Authorities of the Moving Party hereinafter referred to as BOA)*

*Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815 at para. 30 (Tab 2, BOA)*

60. The *Access To Information Act* also provides that decisions on the disclosure of government information should be reviewed independently of government. More particularly, the *Access To Information Act* contemplates two levels of independent review.

#### *Section 2(1), Access to Information Act, R.S.C., 1985, c. A-1*

61. In the first instance, the Information Commissioner is empowered to investigate complaints, including in respect of allegations that the head of the government institution failed to provide all records responsive to an access Request which is what occurred in this Application.

62. Where, following an investigation in which the Commissioner finds a complaint to be well-founded, the head of the government institution refuses to provide access to records that have been determined to be responsive to a Request, the *Access To Information Act* provides for a second level of independent review by the Federal Court. In particular, paragraph 42(1)(a) of the *Access To Information Act* allows the Information Commissioner, with the consent of the individual who requested access to the records, to

apply to the Federal Court for a review of the government head's decision not to disclose records in response to her recommendations. This Application has been filed with the consent of the Complainant pursuant to section 42(1)(a) of the *Access To Information Act*.

**Sections 37 & 42(1), *Access to Information Act*, R.S.C., 1985, c. A-1**

63. The Respondent has refused to disclose records that the Information Commissioner determined were responsive to the Complainant's access Request and which she recommended should be processed in accordance with the *Access To Information Act*.
64. Section 46 of the *Access To Information Act* provides that, notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of review proceedings, including proceedings under section 42, examine any record to which the *Access To Information Act* applies and that no such record may be withheld from the Court on any grounds.

**Section 46, *Access to Information Act*, R.S.C., 1985, c. A-1**

65. In order to conduct its review, which is a *de novo* hearing, the Court needs to examine the record in issue in order to determine the merits of this Application (i.e., whether the Respondent is withholding these records from the Complainant without justification).
66. Pursuant to section 49 of the *Access To Information Act*, if the Court determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, the Court shall order the head of the government institution to disclose the record or part of the record to the person who requested it, subject to such conditions as the Court deems appropriate.

**Section 49, *Access to Information Act*, R.S.C., 1985, c. A-1**

**B. INTERLOCUTORY INJUNCTION (RULE 373)**

**(a) Introduction**

67. Rule 373(1) of the *Federal Court Rules* provides that on a motion, a judge may grant an interlocutory injunction.

**Rule 373, Federal Courts Rules, SOR/98-106**

68. In order to obtain an interlocutory injunction, the moving party must demonstrate:

- (i) a serious issue to be tried;
- (ii) that the moving party will suffer irreparable harm if the relief is not granted; and
- (iii) the balance of convenience favours the moving party.

*RJR-MacDonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311 at 334 (Tab 3, BOA)*  
*Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC, 2015 FCA 104 at para. 11*  
*(Tab 4, BOA)*

(b) **There is a serious issue to be tried**

69. The threshold for meeting the serious issue branch of the test is relatively low. A motions judge should determine whether the test has been satisfied on the basis of common sense and an extremely limited review of the case on the merits

*RJR-MacDonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311 at pp. 337-338 (Tab 3, BOA)*

70. The issue to be tried in the Application is whether the Respondent was without justification in refusing to further process the Complainant's Request and in refusing to provide the Complainant the record in issue in the Application (subject to applicable exemptions). The Information Commissioner determined that the Respondent did not provide the Complainant with access to all of the records responsive to his Request.

71. An Application for judicial review pursuant to section 42 of the *Access To Information Act* is a *de novo* hearing. In order to be able to determine the merits of this Application and, in particular, whether the Respondent was without justification in refusing to abide by the Information Commissioner's findings and recommendations made on the basis of her first-level independent investigation, the Court and counsel must have access to the record in issue.

72. Access to the record in issue is not only essential to the ability of the Court to carry out the second level of independent review mandated by the *Access to Information Act*, it is fundamental to safeguarding the Complainant's quasi-constitutional right of access to information which will be denied if the record in issue is permanently destroyed prior to the final determination of this Application.

**Subsection 4(1), *Access To Information Act***

73. The record in issue will also be essential to another Application that will be filed by the Information Commissioner and the Complainant (Bill Clennett) in the Ontario Superior Court of Justice as soon as sections 230-231 of Bill C-59 enter into force. In that pending Application, the Information Commissioner and Mr. Clennett will seek a Declaration that Bill C-59's amendments to the *Ending the Long-gun Registry Act* infringe section 2(b) of the *Canadian Charter of Rights and Freedoms* and violate the rule of law.

74. For these reasons, there is a serious issue to be tried.

**(c) Irreparable harm**

75. The second branch of the test requires the moving party to convince the reviewing court that it will suffer irreparable harm if the injunctive relief sought is not granted. As interpreted by the Supreme Court in *RJR-MacDonald*, "irreparable" refers to the nature of the harm rather than its magnitude.

*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at p. 341 (Tab 3, BOA)

**1. The Destruction Of The Record In Issue Prior To A Final Determination Of This Application**

76. In the event that the record in issue is destroyed prior to the final determination of this Application, the Complainant's right of access to government information will be irreparably harmed. In addition, the Information Commissioner's right to seek judicial review in this Court on behalf of the Complainant of the Minister's refusal to follow her recommendations will be irreparably harmed as the Application will effectively be rendered moot.

77. Emails and Briefing Notes attached as Exhibits to the Affidavit of Neil O'Brien demonstrate that, when it gave assurances to the Information Commissioner, the Minister's Office was not only fully aware of implementation plans to destroy the long-gun registry information requested but also attempting to accelerate the destruction of those records in 2012. In the absence of an Order from this Court preventing the destruction of the record in issue, the Respondent will immediately destroy the record in issue once Bill C-59 becomes law which is imminent (i.e. in June 2015).

**Affidavit of Neil O'Brien, paras. 22-32, Exhibits "M"-“Y”**

78. Long-gun registry information, which the Information Commissioner determined through her investigation to be responsive to the Complainant's access to information Request, was deleted from the Canadian Firearms Information System between October 25 and 29, 2012 and between April 10 and 12, 2015. This destruction occurred despite assurances provided by the Respondent Minister that long gun registry records would not be destroyed until a response was provided under the *Access To Information Act* and any related investigation and court proceedings were completed.

**Affidavit of Neil O'Brien, paras. 33-43**

79. An email from a Canadian Firearms Program official described the destruction of long-gun registry information as “Totally Done! They are permanently gone”. The Director of Communications for Public Safety Minister Toews was quoted by the *Globe and Mail* as saying “Now that these data have been deleted they can never be recovered”.

**Affidavit of Neil O'Brien, Exhibits “Z”, “CC”**

80. Once the record in issue in this Application is destroyed, there is no ability to recreate it. The Complainant's right of access to the record in issue will be forever lost. That constitutes irreparable harm.

**Affidavit of Neil O'Brien, Exhibits “K” and “Z”**

2. **The Destruction Of The Record In Issue Will Completely Deny The Complainant's Right Of Access And The Information Commissioner's Right To Seek Judicial Review On The Requester's Behalf**

81. The Information Commissioner has determined that the Complaint was well-founded and that the Complainant has been denied access to records that are responsive to his Request. The destruction of the record in issue will deprive the Complainant of his right to information pursuant to the *Access To Information Act*.

82. The Complainant's Request for information was made prior to the enactment of the *Ending the Long-gun Registry Act* and more than 3 years before Bill C-59 was tabled for First Reading. The Complainant had a vested right of access to the record in issue subject to any applicable exemptions under the *Access to Information Act*. At the time of the Complainant's Request, he was entitled to access to information from the long-gun registry pursuant to the *Access to Information Act*. If the record in issue is destroyed, the Complainant will never be able to obtain that information.

83. In addition, the Information Commissioner's Application to this Court on behalf of the Complainant will be completely undermined and this Court cannot determine the merits of the Application if the record in issue is permanently destroyed. In order for the Information Commissioner to fulfil her mandate, she must be able to seek judicial review from this Court, pursuant to section 42 of the *Access To Information Act*, when her recommendations regarding access to information are not followed. This Court cannot fully and properly assess the Information Commissioner's Application if it does not have access to the record in issue to determine whether the Respondent's refusal to disclose the information identified by the Information Commissioner as being responsive to the Complainant's Request is justified.

84. Lastly, this Court is empowered by section 46 of the *Access To Information Act* to examine the record in issue in this Application. This power becomes meaningless if the record in issue is destroyed.

3. Decision Of Quebec Superior Court Of Justice Blanchard Granting an Interlocutory Injunction Prohibiting The Destruction Of Long-gun Records

85. In *Quebec (Procureur général) c. Canada (Procureur général)*, Justice Blanchard granted an interlocutory injunction to prevent the destruction of the long guns records for the Province of Quebec. Justice Blanchard held that the Attorney General of Quebec met the three part test of serious question to be tried, irreparable harm and balance of convenience.

*Quebec (Procureur général) c. Canada (Procureur général)*, 2012 QCCS 1614 (Sup. Ct.) (Tab 5, BOA)

86. In finding irreparable harm, Justice Blanchard held:

[58] Clearly, for the party claiming the information in the registry, its destruction is an irreparable loss.

4. Decision of Ontario Superior Court of Justice in Barbara Schlifer Commemorative Clinic v. Canada Decision

87. In *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, Justice Brown of the Ontario Superior Court of Justice declined to grant an interlocutory injunction preserving the records contained in the long-gun registry. However, the facts in the *Schlifer Clinic* decision are entirely distinguishable from the facts in the case at bar.

*Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 (Sup. Ct.) (Tab 6, BOA)

88. In *Schlifer*, Justice Brown made reference to Justice Blanchard's decision in the Quebec Superior Court wherein the Court granted the interlocutory relief sought by the Government of Quebec. Justice Brown distinguished the Quebec decision from the facts in the case before him on the basis that the Government of Quebec had claimed an interest in the information that had been collected for the long-gun registry (due to the fact that it had been involved in the collection of that data and wanted to be able to use it for its own firearms registry).

*Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 at para. 94 (Sup. Ct.) (Tab 6, BOA)

89. In *Schlifer*, the applicants did not have any specific interest in the data already collected.

In the case at bar, the Information Commissioner and the Complainant do have an interest in the record in issue which is the subject matter of this Application filed with the consent of the Complainant.

90. The issues in the *Schlifer Clinic* decision did not involve access to a government record that is the very subject matter of an Application before a court. In other words, the records the Complainant requested are those in existence at the time he exercised his quasi-constitutional right of access and which will be permanently destroyed absent the Order sought in this motion.

91. In *Schlifer*, Justice Brown found that, because it was technically possible to re-build a registry from scratch, the destruction of the records from the long-gun registry would not, in the strictly legal sense, cause irreparable harm, but only "a financial burden for the taxpayer". In contrast, the record in issue can never be rebuilt once destroyed. As stated by a government official in Exhibit "Z" to Neil O'Brien's affidavit: "They are permanently gone".

*Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 at para. 156 (Sup. Ct.) (Tab 6, BOA)

92. Justice Brown denied the interlocutory injunction because the applicant Schlifer Clinic failed to prove the irreparable harm it alleged would occur if the long-gun registry was destroyed. In the words of the Ontario Divisional Court:

[10] The motion judge concluded that the application fell short in establishing that irreparable harm would result in the event an interlocutory injunction was not granted. As he noted, the Applicant submitted that "were an injunction not granted, women who experience domestic violence would suffer two main types of irreparable harm: (i) serious physical and psychological harm, and possible death; and, (ii) the loss of information in the Registry as a result of the planned destruction of registration data concerning non-restricted firearms and the failure to collect information about non-restricted firearms transferred since the enactment of the Repealing Act."

[11] Keeping in mind that gun owners have to have a licence, and that the right to possess any firearm can be constrained by the loss of a licence where there are concerns about domestic violence, or mental

health issues, the motion judge concluded that there was scant evidence that repeal of the requirement to also register individual non-restricted firearms would have any effect on the risk of violence towards women. He was entitled to consider this in assessing whether to grant an injunction. The Applicant's interest in the preservation of the data also depended on this link.

*Barbra Schlifer Commemorative Clinic v Canada (Attorney General), 2012 ONSC 5577 (Div. Ct) (Tab 7, BOA)*

93. In *Schlifer*, Justice Brown also commented that the request for interlocutory relief went beyond a request to simply preserve previously collected data contained in the long-gun registry. In contrast, the Information Commissioner simply seeks to preserve the record in issue that already exists. In other words, the Information Commissioner seeks to preserve the status quo, nothing more.
94. For these reasons, there will be irreparable harm if the record in issue is permanently destroyed.

(d) **The Balance Of Convenience Favours Granting The Order Sought**

95. The third branch of the test for obtaining an interlocutory injunction requires the balance of convenience to favour the moving party.
96. In *Quebec (Procureur général) c. Canada (Procureur général)* Justice Blanchard found the balance of convenience lay in favour of the Attorney General of Quebec:

[68] To draw a parallel with *Harper v. Canada (A.G)*, the Court finds that refusing the injunction would be tantamount to ruling in favour of Canada before the proceeding is concluded, since the effect of C-19 on the exercise of Quebec's constitutional powers is ultimately more deleterious than the beneficial effects on the general interest objectives sought by C-19, particularly in light of the decision of the Supreme Court in *Reference re Firearms Act*, which found that the registration of long guns serves the public interest. (emphasis added)

*Quebec (Procureur général) c. Canada (Procureur général), 2012 QCCS 1614 at para. 68 (Sup. Ct) (Tab 5, BOA)*

97. In *Schlifer*, Justice Brown held at paragraph 160 that "in light of the declared purpose of the *Repealing Act* [Bill C-19], I must assume that the legislation will promote the public

interest." Justice Brown then found that the applicant Schlifer Clinic failed to prove a public benefit in suspending the legislation:

[161] Many of the Clinic's arguments on the balance of convenience focused on the absence of any harm which the AGC would suffer if the injunction was granted. As I read *RJR-MacDonald*, it falls to the Clinic to demonstrate something more – i.e. that the suspension of the legislation would itself provide a public benefit. Whereas in the Québec decisions Blanchard J. so found, his finding was made in the context of another public authority, the Province of Québec, intending to create its own registry for non-restricted firearms and, in the interim, seeking the preservation of existing Québec-related data.

*Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 at paras. 160-162 (Sup. Ct.) (Tab 6, BOA)

98. The Complainant's access to information Request predated the coming into force of the *Ending the Long-gun Registry Act*. Moreover, as the law currently stands, section 29 of the *Ending the Long-gun Registry Act* does not oust the jurisdiction of the *Access to Information Act* over long-gun registry information. Parliament decided that only the *Privacy Act* and the *Library and Archives of Canada Act* did not apply to the operation of section 29 of the *Ending the Long-gun Registry Act*. Consequently, the Complainant's quasi-constitutional right of access, which operates notwithstanding any other Act of Parliament, and the Court's statutorily-mandated second level independent review take precedence over the *Ending the Long-gun Registry Act*.
99. In addition, if the Order requested by this motion is not granted, the Complainant's quasi-constitutional right of access will be eradicated and this Court's ability to engage in the second level of independent review mandated by the *Access To Information Act* will be ousted.
100. This motion simply seeks to preserve the status quo. There is no prejudice to the Respondent if the record in issue is delivered to this Court's Registry (as a confidential record) pending the final outcome of this Application. The record in issue already exists and the requirement to deliver it to the Registry will not place any onerous requirements upon the Respondent.

101. It is noteworthy that Bill C-59 contains no declared purpose for sections 230-231 that amend the *Ending the Long-gun Registry Act*. Bill C-59 is entitled “*An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures*”. The purpose of Bill C-59 is to implement the Government’s Budget. Sections 230-231 of Bill C-59 retroactively expunge the Complainant’s right of access to government information and oust this Court’s jurisdiction to decide the Application. The public interest in rights of access to government information and maintaining the status quo while this Application is being decided outweighs any interest that permits destroying the record in issue and retroactively destroying access to information rights.

102. For these reasons, the Information Commissioner submits that the balance of convenience favours granting this motion.

**C. THE PRESERVATION ORDER (RULE 377)**

103. Rule 377 of the *Federal Courts Rules* provides that “on motion, the Court may make an order for the custody or preservation of property that is, or will be, the subject-matter of a proceeding or as to which a question may arise therein.”

**Rule 377, *Federal Courts Rules*, SOR/98-106**

104. Rule 378 of the *Federal Courts Rules* provides for the information that is to be contained in an order made under Rule 377. Rule 378 requires that an order under Rule 377 shall be directed to the protection of the property in question.

**Rule 378, *Federal Courts Rules* SOR/98-106**

105. The moving party must identify the property in respect of which the Court will exercise its jurisdiction and persuade the Court that such property requires protection.

***Molson Breweries v. Kuettner, [1999] 3 C.P.R. 479 (Fed. Ct.) at para. 24, (Tab 8, BOA)***

106. The sole purpose of an order under Rule 377 is to maintain the status quo by ensuring the preservation of property that is the subject matter of an action.

***Droit de Reproduction Mecaniques des auteurs, compositeurs et éditeurs (S.D.R.M.) v. Trans World Record Corp., [1977] 2 F.C. 602 at p. 604 (Tab 9, BOA)***

107. The test used in granting a preservation order is the same as it is for granting an interlocutory injunction.

*Boulet Lemelin Yacht Inc v The Paceship Sailboat*, 2006 F.C. 1259 at para. 108 (Tab 10, BOA)

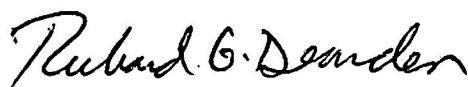
108. The Applicant relies upon the submissions set out above as they relate to the three part test for granting an interlocutory injunction. This motion simply seeks to preserve the status quo. The Order sought can be granted pursuant to Rule 377 of the *Federal Courts Rules*.

#### PART IV - ORDER SOUGHT

110. The Information Commissioner requests the following relief:

1. An Order pursuant to either Rule 373(1) or Rule 377 of the *Federal Courts Rules* requiring the Respondent Minister to deliver the record in issue in this Application to the Registry of the Federal Court which shall be filed with the Registry as a confidential record until the final disposition of this Application (and all other appeals have been exhausted) or the Court orders otherwise.
2. In the alternative, an Order prohibiting the Respondent from destroying the record in issue in this Application until the final disposition of this Application (and all appeals have been exhausted) or the Court orders otherwise.

Date: June 3, 2015



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the Information Commissioner of Canada

## PART V – LIST OF AUTHORITIES

### I. Statutes and Rules

*Access to Information Act, R.S.C. 1985, c.A-1*

*Ending the Long-Gun Registry Act,*

*Bill C-59*

*Federal Courts Rules*

### II. Case Law

1. *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306
2. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815
3. *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311
4. *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104
5. *Quebec (Procureur général) c. Canada (Procureur général)*, 2012 QCCS 1614 (Sup. Ct.)
6. *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 (Sup. Ct.)
7. *Barbra Schlifer Commemorative Clinic v Canada (Attorney General)*, 2012 ONSC 5577 (Div. Ct)
8. *Molson Breweries v. Kuettner*, [1999] 3 C.P.R. 479 (Fed. Ct.)
9. *Droit de Reproduction Mecaniques des auteurs, compositeurs et éditeurs (S.D.R.M.) v. Trans World Record Corp.*, [1977] 2 F.C. 602
10. *Boulet Lemelin Yacht Inc v The Paceship Sailboat*, 2006 FC 1259

340

Court File No.: T-0785-15

**FEDERAL COURT**

**B E T W E E N :**

**INFORMATION COMMISSIONER OF  
CANADA**

**Applicant**

**- and -**

**MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

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**MEMORANDUM OF FACT AND LAW**

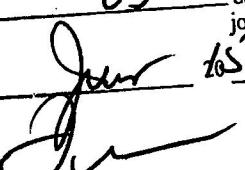
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Solicitors for the Information Commissioner  
of Canada

16001

SERVICE OF A TRUE COPY HEREOF	
SIGNIFICATION DE COPIE CONFORME	
Admitted the	03
Acceptée le	day jou
of	Jan 16
de	
for	William F. Pentney
pour	Deputy Minister of Justice
	and Deputy Attorney General of Canada
	Sous-Ministre de la Justice
	et Sous-procureur général du Canada

**Page 395  
is not relevant  
est non pertinente**

**Pages 396 to / à 401  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 402  
is not relevant  
est non pertinente**

Federal Court



Cour fédérale

Ottawa, ON  
K1A 0H9

June 9, 2015

**BY E-MAIL**

Mr. Richard Dearden  
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Mr. Robert MacKinnon  
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Dear Counsel:

**RE:** The Information Commissioner of Canada v. The Minister of Public Safety and Emergency Preparedness  
Court File No.: T-785-15

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This is to advise of the following Direction of Madam Prothonotary Mireille Tabib dated June 9, 2015:

*"A case management telephone conference will be held at 3:30 pm on June 10, 2014 to set a schedule for all steps leading to a hearing of the Applicant's motion, including fixing a date of hearing. The parties shall be prepared to discuss all scheduling aspects, including whether responding affidavits are to be filed, the expected subject matter thereof, whether cross-examinations are contemplated and if so, the availability of the affiants and counsel. Counsel are encouraged to discuss a proposed schedule ahead of time and to take any step necessary to ensure an efficient and expeditious schedule."*

Yours truly,  
*J.D.*  
Julie Dulac  
Registry Officer  
Case Management

000403

**Pages 404 to / à 405  
are not relevant  
sont non pertinentes**

Federal Court



Cour fédérale

Date: 20150623

Docket: T-785-15

Ottawa, Ontario, June 23, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**INFORMATION COMMISSIONER OF  
CANADA**

**Applicant  
(Moving Party)**

and

**MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**DIRECTION**

FURTHER to the Order made on June 22, 2015;

UPON being advised that the external hard drive, as described in paragraph 13 of the affidavit of Jennifer Walsh affirmed on June 15, 2015 [the material evidence] has been delivered in person to the Registry of the Federal Court [Registry] prior to 10:00 a.m. on June 23, 2015;

Page: 2

**UPON** considering that the material evidence has been filed with the Registry under seal, and that, as a further precautionary measure, the access to the material evidence should be strictly limited and be kept in a secured environment;

**THIS COURT DIRECTS** that the material evidence shall be kept in a secure area in the Designated Proceedings Section until the Court directs otherwise.

“Luc Martineau”

Judge

**Pages 408 to / à 410  
are not relevant  
sont non pertinentes**

OFFICE OF THE INFORMATION COMMISSIONER OF  
CANADA and BILL CLENNETT  
Applicants

-and- ATTORNEY GENERAL OF CANADA  
Respondent

Court File No.

June 23 2015

Mr. R. Dearden for the I.C.C.  
moving party

Mr. R. McKinnon for the  
A.G. Canada

Upon hearing from counsel and considering the  
materials filed, I order this proceeding to  
be transferred to the Divisional Court pursuant  
to section 8 of the J.R.P.A.

Order to issue and signed.

Blackard J.

OTT\_LAW\533605611

ONTARIO SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT OTTAWA

APPLICATION RECORD  
VOLUME 1

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Counsel for the Applicants

FILED SUPERIOR COURT  
OF JUSTICE AT OTTAWA

JUN 23 2015

DÉPOSÉ À LA COUR  
SUPÉRIEURE DE JUSTICE À OTTAWA

Court File No. 15-64739

**ONTARIO SUPERIOR COURT OF JUSTICE  
(ONTARIO)**

THE HONOURABLE ) TUESDAY, THE 23<sup>rd</sup>  
 )  
JUSTICE C. HACKLAND ) DAY OF JUNE, 2015

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA and BILL CLENNETT**

**APPLICANTS  
(Moving Parties)**

-and-

**ATTORNEY GENERAL OF CANADA**

**RESPONDENT**

**ORDER**

**THIS MOTION**, made by the Applicants/Moving Parties, was heard this day at the Ottawa Court House, 161 Elgin Street, Ottawa, Ontario, K2P 2K1.

**ON READING** the Motion materials filed by the Applicants and upon hearing the submissions of the lawyers for the parties,

**UPON** being advised of the Order of the Honourable Justice L. Martineau of the Federal Court dated June 22, 2015,

-2-

UPON Counsel for Attorney General of Canada advising the Court that the records with respect to the destruction of long-gun registry records from the Canadian Firearms Registry are not subject to subsection 29(4) of the *Ending the Long-gun Registry Act* (as amended by Bill C-59).

1. **THIS COURT ORDERS** that this Application be transferred to the Divisional Court pursuant to section 8 of the *Judicial Review Procedure Act*;
2. Costs to be reserved to the Divisional Court panel hearing this Application on its merits.

*Hackland J.*

Justice C. Hackland

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AU REGISTRE NO. 73-13	

INFORMATION COMMISSIONER OF CANADA and BILL  
CLENNETT  
Applicants/ Moving Parties

-and- ATTORNEY GENERAL OF CANADA

Respondents

Court File No. 15-64739

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
OTTAWA

**ORDER**

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Solicitors for the Applicants/Moving Parties

**Page 415  
is not relevant  
est non pertinente**

Court File No. 15-64739

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA**  
**and BILL CLENNETT**

Applicants

and

**ATTORNEY GENERAL OF CANADA**

Respondent

---

**NOTICE OF MOTION (LEAVE TO INTERVENE)**

BY

**INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, ALBERTA  
INFORMATION AND PRIVACY COMMISSIONER, BRITISH COLUMBIA  
INFORMATION AND PRIVACY COMMISSIONER, MANITOBA OMBUDSMAN,  
NEWFOUNDLAND AND LABRADOR INFORMATION AND PRIVACY  
COMMISSIONER, NORTHWEST TERRITORIES INFORMATION AND PRIVACY  
COMMISSIONER, NOVA SCOTIA INFORMATION AND PRIVACY  
COMMISSIONER, NUNAVUT INFORMATION AND PRIVACY COMMISSIONER,  
PRINCE EDWARD ISLAND INFORMATION AND PRIVACY COMMISSIONER,  
COMMISSION D'ACCÈS À L'INFORMATION DU QUÉBEC, SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER, AND YUKON OMBUDSMAN  
AND INFORMATION AND PRIVACY COMMISSIONER**

---

The Information and Privacy Commissioner of Ontario (the "Ontario Commissioner"),  
Alberta Information and Privacy Commissioner, British Columbia Information and Privacy  
Commissioner, Manitoba Ombudsman, Newfoundland and Labrador Information and Privacy

Commissioner, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner, Nunavut Information and Privacy Commissioner, Prince Edward Island Information and Privacy Commissioner, Commission d'accès à l'information du Québec, Saskatchewan Information and Privacy Commissioner, and Yukon Ombudsman and Information and Privacy Commissioner (together the "commissioners") will make a motion to a judge of this Honourable Court on a date to be fixed by the Registrar, at 10:00 a.m. or so soon after that time as the motion can be heard at 161 Elgin Street, Ottawa, Ontario.

**PROPOSED METHOD OF HEARING:** The motion is to be heard in writing pursuant to Rule 37.12.1(4), unless the Court orders otherwise.

**THE MOTION IS FOR** an order:

- (i) granting the commissioners leave to intervene as friends of the court on the terms that they will make submissions through the Ontario Commissioner and will not seek to make separate submissions;
- (ii) granting the commissioners leave to file an affidavit appending as exhibits the material referred to at paragraph 42 of the affidavit of Brian Beamish sworn November 9, 2015;
- (iii) granting the commissioners leave to file a factum not exceeding 20 pages and leave to make argument to the court on the hearing of the application not exceeding 30 minutes;
- (iv) that the commissioners shall neither seek nor be liable for costs in connection with their intervention in the application;
- (v) that there be no costs of this motion; and
- (vi) such further and other order as to this Honourable Court seems just.

THE GROUNDS FOR THE MOTION ARE:

**The Application before this Court**

1. This motion is for leave to intervene in an application brought by the Information Commissioner of Canada (ICC) and Bill Clennett (the "applicants") seeking declaratory and other relief relating to the destruction of the Long-gun Registry (the "registry") under the *Ending the Long-gun Registry Act (ELRA)* which came into effect on April 5, 2012. At the time the applicants brought this application, partial destruction of the registry had already taken place despite the existence of a pre-existing and "well-founded" request under the *Access to Information Act (ATIA)* for access to the entire registry. The application raises constitutional issues under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (access as a derivative right under freedom of expression) and the constitutional principles of the rule of law and judicial independence.
2. More specifically, the applicants seek declarations of invalidity for subsequent amendments to ss. 29 and 30 of the *ELRA* made pursuant to the *Economic Action Plan 2015 Act, No. 1 (EAP)* which came into force on June 23, 2015. Those amendments:
  - a. retroactively authorize the destruction of records in the registry despite the existence of a valid access request and ongoing judicial review brought by the ICC;
  - b. retroactively exclude the application of the *ATIA* with respect to the destruction of records in the registry;
  - c. retroactively immunize the Crown, Crown servants and the Commissioner of Firearms for any administrative, civil or criminal proceedings with respect to the

destruction of information in the registry, as well as for any act or omission done in purported compliance with the *ATIA* in relation to the registry information in the Canadian Firearm Registry; and

- d. oust the jurisdiction of the Federal Court to decide the ICC's judicial review application under s. 42(1)(a) of the *ATIA*.
3. The applicants claim that the amended ss. 29 and 30 of the *ELRA* infringe or deny the applicant Bill Clennett's right to freedom of expression under s. 2(b) of the *Charter*, including the derivative right of access to government documents. They further argue that this infringement is not justified under s. 1 of the *Charter* and that, by virtue of s. 52 of the *Constitution Act, 1982*, ss. 29 and 30 of the amended *ELRA* are of no force or effect. The applicants also claim that the retroactive nature of the amendments to the *ELRA*, which oust the jurisdiction of the Federal Court and immunize officials who may have wilfully violated the *ATIA*, violates constitutional principles of the rule of law and judicial independence.

#### **The Proposed Intervenors**

4. The commissioners are responsible for independently reviewing government decisions on access to government held records under the access to information statutes of their respective provinces and territories.
5. All provinces and territories in Canada have substantially similar access to information statutes providing for: a right of access to records held by a public body; exemptions from the right of access; request and government decision-making processes; listed exclusions from the scope of the legislation; and offence provisions.
6. The commissioners administer, respectively, the following statutes:
  - a. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31

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b. *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56

c. *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25

d. *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165

e. *Freedom of Information and Protection of Privacy Act*, CCSM c F175

f. *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2

g. *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20

h. *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5

i. *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20

j. *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01

k. *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1

l. *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01

m. *Access to Information and Protection of Privacy Act*, RSY 2002, c 1

**The grounds for granting leave to intervene are met**

7. This application raises issues of fundamental importance with respect to: (a) the scope of the constitutionally protected right of access to government held information as a facet of freedom of expression under s. 2(b) of the *Charter*; and (b) government and legislative action that impinges on judicial and/or tribunal independence and violates constitutional principles of the rule of law.
8. Given the constitutional nature of the issues raised, the outcome of this application is likely to have an impact beyond the interests of the parties.

9. As the supervisory bodies responsible for providing independent review of government decisions on access to information under their home statutes, and ensuring that public bodies comply with their disclosure obligations, the commissioners have a genuine interest in the issues raised in this application.
10. The Court's ruling on the constitutional issues raised in this application will significantly affect: (a) the right of access to government held records, (b) the authority of the commissioners to review government decisions on access, and (c) the enforcement mechanisms under the statutes.
11. The commissioners have considerable experience and expertise independently reviewing government decisions on access to information consistent with the values underlying s. 2(b) of the *Charter*.
12. The commissioners are uniquely situated to provide a nation-wide perspective on the issues raised in this application.
13. As lead intervener, the Ontario Commissioner will bring to the Court experience and expertise which has proven useful to the courts on several occasions. The Ontario Commissioner has appeared as an intervener before this Court, the Ontario Court of Appeal, the Federal Court of Appeal and the Supreme Court of Canada in several cases and has made submissions that were of assistance to the court and distinct from those of other parties.
14. If granted leave to intervene, the commissioners will make submissions on the hearing of the application that will be of assistance to the Court and that will be different from those of the parties and any other interveners, addressing:
  - a. the scope of the derivative right of access under s. 2(b) of the *Charter* as it pertains to access to information legislation and the approach the court should

take in considering whether any infringement of the s. 2(b) right is justified under s. 1 of the *Charter*;

- b. the constitutional principles of judicial and tribunal independence and the rule of law as they pertain to the administration of justice under access to information legislation; and
- c. the impact the Court's ruling on these issues will have on the access to information statutes administered by the commissioners.

15. There are no judicial decisions in Canada ruling on the application of the derivative right of access under s. 2(b) of the *Charter* in respect of records which have been ordered disclosed under access to information legislation.

16. The material appended as exhibits at paragraph 42 of the affidavit of Brian Beamish sworn November 9, 2015 provide examples of public discussion in response to the disclosure of records which will assist the Court in determining the application of the derivative right of access under s. 2(b) of the *Charter*.

17. The proposed intervention by the commissioners will not cause any prejudice to the parties to the application.

18. If leave to intervene is granted by the Court, the commissioners have agreed that the Ontario Commissioner will make submissions on their behalf and that they will not seek to make separate submissions to the Court.

19. The commissioners do not propose to make submissions of law in respect of the constitutional principles of the rule of law beyond those appearing in the applicant's application record and will adopt those submissions as their own.

20. The commissioners will not seek costs in the application.

21. The commissioners will comply with any terms or conditions that this Honourable Court may set in granting leave to intervene.
22. *Courts of Justice Act*, R.S.O. 1990, Chap. C.43, s. 11(2).
23. Rules 13.02, 14 and 37 of the *Rules of Civil Procedure*.
24. The *Canadian Charter of Rights and Freedoms; Ending the Long-gun Registry Act*, SC 2012, c 6; *Economic Action Plan 2015 Act, No. 1*, SC 2015, c 36; *Access to Information Act*, RSC 1985, c A-1; *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165; *Freedom of Information and Protection of Privacy Act*, CCSM c F175; *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2; *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5; *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01; *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1; *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01; and the *Access to Information and Protection of Privacy Act*, RSY 2002, c 1.
25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Applicants' application record;

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2. The affidavit of Brian Beamish, sworn November 9, 2015; and
4. A draft order; and
4. Such further and other material as counsel may advise and this Honourable Court may permit.

November 10, 2015;

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**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

**Court File No. 15-64739**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT: Ottawa

**NOTICE OF MOTION  
(LEAVE TO INTERVENE)**

**INFORMATION AND PRIVACY  
COMMISSIONER OF ONTARIO**  
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Counsel for the Moving Parties

Court File No. 15-64739

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants

and

**ATTORNEY GENERAL OF CANADA**

Respondent

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**AFFIDAVIT OF BRIAN BEAMISH  
(Sworn November 9th, 2015)**

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**I, Brian Beamish, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:**

1. I am the Information and Privacy Commissioner of Ontario (the "Ontario Commissioner"), appointed under the *Freedom of Information and Protection of Privacy Act* ("FIPPA")<sup>1</sup> as an officer of the Legislative Assembly of Ontario. I was appointed to this office on an acting basis from July 1, 2014 to February 25, 2015, when my five year appointment was confirmed by the Legislative Assembly of Ontario. From 2005 to July 1, 2014 I held the position of Assistant Commissioner, in which capacity I was responsible for overseeing all of the

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<sup>1</sup> *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("Ontario FIPPA"), s. 4(1).

investigative and tribunal functions of the Ontario Commissioner's Office. I also served as Director of Policy and Compliance with this Office from 1999 to 2005.

2. In my capacity as the Ontario Commissioner, I am responsible for administering *FIPPA*, the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") and the *Personal Health Information Protection Act, 2004*.<sup>2</sup> As such, I have knowledge of the matters to which I depose in this affidavit.

3. I swear this affidavit in support of this motion for leave to intervene in the within application jointly on my own behalf and on behalf of the other provincial and territorial information and privacy commissioners named herein as moving parties (hereinafter referred to collectively as the "moving parties" or "commissioners"), as follows:

Alberta Information and Privacy Commissioner (Jill Clayton) appointed under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25

British Columbia Information and Privacy Commissioner (Elizabeth Denham) appointed under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165

Manitoba Ombudsman (Charlene Paquin) appointed under the *Ombudsman Act*, C.C.S.M. c. O45 with responsibility for the *Freedom of Information and Protection of Privacy Act*, CCSM c F175

Newfoundland and Labrador Information and Privacy Commissioner (Ed Ring) appointed under the *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 and responsible for the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2

Northwest Territories Information and Privacy Commissioner (Elaine Keenan Bengts) appointed under the *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20

Nova Scotia Information and Privacy Commissioner (Catherine Tully) appointed under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5

Nunavut Information and Privacy Commissioner (Elaine Keenan Bengts) appointed under the *Access to Information and Protection of Privacy Act*, SNWT

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<sup>2</sup> *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56 ("MFIPPA"); *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Sched A.

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(Nu) 1994, c 20

Prince Edward Island Information and Privacy Commissioner (Karen A. Rose) appointed under the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01

Commission d'accès à l'information du Quebec (Jean Chartier, Président) appointed under *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1

Saskatchewan Information and Privacy Commissioner (Ronald J. Kruzeniski) appointed under the *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01

Yukon Ombudsman (Diane McLeod-McKay) appointed under the *Ombudsman Act*, is also the Information and Privacy Commissioner under the *Access to Information and Protection of Privacy Act*, RSY 2002, c 1

4. I have personally communicated with each of these commissioners and have provided them with a copy of this affidavit setting out the basis for this motion for leave to intervene and a summary of the proposed submissions to this Honourable Court should the motion be granted. Each commissioner has informed me in writing of his or her agreement with the contents of this affidavit and has authorized me to bring this motion on their behalf. Each has agreed that my office will take the lead role in making joint submissions to the Court, that my office is authorized to advance the submissions summarized herein on their behalf and that they will not seek to make separate submissions to the Court.

5. I have reviewed the contents of the application record and supplemental application record and am familiar with the issues and arguments to be advanced by the applicants in the within application. In addition, I am familiar with the access to information statutes, the decisions of the commissioners, and the jurisprudence of the courts to which I refer in this affidavit. I make this affidavit on the basis of personal knowledge or information and belief, in which case I believe the contents to be true.

### The application before this Court

6. This motion is for leave to intervene in an application brought by the Information Commissioner of Canada (ICC) and Bill Clennett (the "applicants") seeking declaratory and other relief relating to the destruction of the Long-gun Registry (the "Registry") under the *Ending the Long-gun Registry Act (ELRA)*<sup>3</sup> which came into effect on April 5, 2012. At the time the applicants brought this application, partial destruction of the Registry had already taken place despite the existence of a pre-existing and "well-founded" request under the *Access to Information Act (ATIA)*<sup>4</sup> for access to the entire registry. The application raises constitutional issues under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (access as a derivative right under freedom of expression) and the constitutional principles of the rule of law and judicial independence.

7. More specifically, the applicants seek declarations of invalidity for subsequent amendments to ss. 29 and 30 of the *ELRA* made pursuant to the *Economic Action Plan 2015 Act, No. 1 (EAP)*<sup>5</sup> which came into force on June 23, 2015. Those amendments:

- (i) retroactively authorize the destruction of long-gun registry records (and copies) despite the existence of a valid access request and ongoing judicial review brought by the ICC;
- (ii) retroactively exclude the application of the *ATIA* with respect to the destruction of long-gun registry records;
- (iii) retroactively immunize the Crown, Crown servants and the Commissioner of Firearms for any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry information, as well as for any act or

<sup>3</sup> *An Act to amend the Criminal Code and the Firearms Act*, SC 2012, c 6.

<sup>4</sup> *Access to Information Act*, RSC 1985, c A-1.

<sup>5</sup> *Economic Action Plan 2015 Act, No. 1*, SC 2015, c 36.

omission done in purported compliance with the *ATIA* in relation to the Long-gun registry information in the Canadian Firearm Registry; and

- (iv) oust the jurisdiction of the Federal Court to decide the ICC's application under s. 42(1)(a) of the *ATIA*.

8. The applicants claim that the amended ss. 29 and 30 of the *ELRA* infringe or deny the applicant Bill Clennett's right to freedom of expression under s. 2(b) of the *Charter*, including the derivative right of access to government documents. They further argue that this infringement is not justified under s. 1 of the *Charter* and that, by virtue of s. 52 of the *Constitution Act, 1982*, ss. 29 and 30 of the amended *ELRA* are of no force or effect. The applicants also claim that the retroactive nature of the amendments to the *ELRA*, which oust the jurisdiction of the Federal Court and immunize officials who may have wilfully violated the *ATIA*, violates constitutional principles of the rule of law and judicial independence.

#### **The moving parties and their home statutes**

9. This affidavit summarizes below the principal components of the public sector access to information statutes administered by each of the moving parties and their roles in the resolution of disputes involving the right of access in their jurisdictions.

#### **Ontario's *FIPPA***

10. Ontario's *FIPPA* and *MFIPPA* govern the rights of access to records held by provincial and municipal government institutions. The purposes of each of these statutes are as follows (in part):

1. (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government;<sup>6</sup>

The provisions of *MFIPPA* are substantially similar to the provisions of *FIPPA* discussed below.

For the sake of brevity, I refer to the provisions of *FIPPA* only.

11. Ontario's *FIPPA* grants every person a right of access to records in the custody or control of a government institution unless a statutory exemption from the right of access applies. *FIPPA* contains a "public interest override" which provides that certain exemptions do not apply where a compelling public interest clearly outweighs the purpose of the exemption.<sup>7</sup> In addition, there is a public interest provision which, in the absence of a request, requires an institution to disclose to the public a record which reveals a grave environmental, health or safety hazard.<sup>8</sup> *FIPPA* also has provisions which exclude categories of records from the application of the statute.<sup>9</sup>

12. Requesters and affected third parties are given a right to appeal access decisions to my office, which is then empowered to investigate and to mediate the dispute. If no settlement is reached, my office may conduct an inquiry to review the institution's decision. This is an adjudicative function. In conducting inquiries into access disputes under *FIPPA*, my office is given the powers, among others, to enter and inspect premises, order the production of records for inspection and summon witnesses to give evidence. The government institution resisting disclosure bears the burden of proving an exemption applies.<sup>10</sup> After hearing the evidence and representations of the parties, my office will make an order disposing of the issues raised in the appeal, which may include an order for disclosure of records that are not exempt or excluded, along with any other appropriate terms or conditions. There is no right of appeal from the orders

<sup>6</sup> *Ontario FIPPA*, s 1(a); *Ontario MFIPPA*, s 1(a).

<sup>7</sup> *Ontario FIPPA*, s 23.

<sup>8</sup> *Ontario FIPPA*, s 11.

<sup>9</sup> *Ontario FIPPA*, s 65(1-6, 8-8.1).

<sup>10</sup> *Ontario FIPPA*, s 53.

of my office which are binding on the institution. Judicial review is available where proper grounds can be established. It is an offence to wilfully obstruct my office in the performance of its statutory functions, make a false statement to or mislead my office, or wilfully fail to comply with an order of my office.<sup>11</sup>

### **Other Provinces and Territories**

13. All other provinces and territories in Canada have substantially similar access statutes, each providing for: a right of access to records held by a government "institution" or "public body" (hereinafter referred to as a "public body"); "exemptions", "exceptions" or "restrictions" from the right of access which largely parallel the provisions of Ontario's *FIPPA*; request and government decision-making processes; listed exclusions from the scope of the legislation; and offence provisions. The access to information statutes of all provinces except Québec and Saskatchewan have explicit purpose clauses similar to the Ontario purpose clause above. Notwithstanding differences in wording, and consistent with rulings of the Supreme Court of Canada, all access statutes share the common purpose of facilitating democracy through an informed citizenry. The purpose clause of the recently enacted *Access to Information and Protection of Privacy Act, 2015* for Newfoundland and Labrador explicitly recognizes this overarching purpose as follows (in part):

- 3(1) The purpose of this Act is to facilitate democracy through
  - a) ensuring that citizens have the information required to participate meaningfully in the democratic process; [and]
  - b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable;<sup>13</sup>

<sup>11</sup> *Ontario FIPPA*, s 61.

<sup>13</sup> *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2.

14. Each provincial and territorial access statute, with the exception of Manitoba, provides for the appointment of a commissioner who is responsible for administering the legislation. The Manitoba statute grants this responsibility to the Ombudsman of that province. For ease of reference, all such officers will be referred to as a "commissioner" except where otherwise indicated. Generally, commissioners are appointed by or on the recommendation of the legislatures of the province or territory and are officers of the legislatures independent of government.<sup>14</sup>

15. All provincial and territorial access statutes establish dispute resolution mechanisms by which appeals, complaints or applications may be filed by requesters and/or affected third parties. All commissioners are granted the powers necessary to carry out their dispute resolution functions, which typically include the powers to investigate and conduct a review of the matter in dispute, require production of disputed records for inspection, enter and inspect premises, summon and examine witnesses on oath, and receive evidence and representations of the parties to the dispute. All commissioners have the duty to maintain the confidentiality of disputed records. In addition, all commissioners have the duty to report annually to their respective legislatures; and many are given ancillary authority to offer comment and engage in research and public education on matters related to their mandates.

16. The British Columbia, Alberta and Prince Edward Island access statutes each have a mandatory public interest override provision which applies whether or not a request for access to

<sup>14</sup> Alberta FIPPA, s 45; BC FIPPA, s 37; Manitoba Freedom of Information and Protection of Privacy Act, CCSM c F175, s 58.1(1); Newfoundland FIPPA, s 86(1); Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6, s 49(7); Access to Information and Protection of Privacy Act, SNWT 1994, c 20, 61; Ontario FIPPA, s 4(1); PEI FIPPA, s 42; Quebec FIPPA, s 104; Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01, s 38; Access to Information and Protection of Privacy Act, RSY 2002, c 1, s 40 and Ombudsman Act, RSY 2002, c 163 s 5.

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a record is made.<sup>15</sup> The override requires the public body to disclose information on significant health, safety and environmental risks or which is in the public interest to disclose for any other reason. The Quebec statute contains a mandatory override for certain exemptions in the case of hazards to life, health, safety and the environment.<sup>16</sup> Newfoundland and Labrador's statute has health and safety and public interest override provisions similar to both Ontario and the above-mentioned provinces.<sup>17</sup> Most other jurisdictions have discretionary provisions which permit (but do not require) a public body to disclose information for health, safety or environmental reasons and/or where it is otherwise in the public interest to do so.

17. All access statutes have offence provisions similar to Ontario's *FIPPA*. The Alberta, Newfoundland and Labrador and Prince Edward Island statutes also make it an offence to destroy, alter, falsify or conceal a record with the intent to evade an access request.<sup>18</sup>

#### **The adjudicative and report/recommendation models**

18. A significant difference among the various statutes relates to the authority of the respective commissioners to resolve access disputes. There are two functional models for provincial commissioners. Quebec, British Columbia, Alberta, Prince Edward Island and Ontario adopt an adjudicative model by which commissioners have order-making authority on appeal from the access decisions of public bodies, including the authority to make binding orders for disclosure of records that are not exempt or excluded. These orders are subject to either appeal or judicial review in the superior court, in which case any order for the disclosure of records will be stayed pending the disposition of the matter by the court.

<sup>15</sup> *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 25; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 32; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01 30.

<sup>16</sup> *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1 s 41.1.

<sup>17</sup> *Newfoundland FIPPA*, s 9.

<sup>18</sup> *Alberta FIPPA*, s 92; *Newfoundland FIPPA*, s 115; *PEI FIPPA*, s 75.

19. Saskatchewan, Nova Scotia, Yukon, Northwest Territories and Nunavut all incorporate variations of a "report and recommendation" model, similar to the federal *ATIA*. In this model, commissioners have the authority to investigate, report on and make recommendations in relation to complaints that a public body has failed to comply with its disclosure obligations under the statutes, but have no order-making authority. In these latter regimes, adjudicative and order-making authority typically resides with the superior court of each jurisdiction.

20. Two provinces have what may be described as hybrid models. After making a report and recommendations under the Manitoba statute, the Ombudsman may refer certain decisions for review by an adjudicator who has the authority to make binding orders which are subject to judicial review. Decisions not referred to an adjudicator may be appealed directly to the superior court. The Newfoundland and Labrador access statute obliges a public body to comply with the recommendations in the commissioner's report unless it brings an application to the court for a declaration that it need not comply.

**Grounds for the motion for leave to intervene**

21. My office and the offices of the other commissioners have a genuine interest in the issues raised in this application. We have relevant experience and expertise and will make submissions that will be of assistance to the Court and different from those of the other parties.

22. If granted leave to intervene, we will not take a position on the ultimate disposition of the application.

**The commissioners have a genuine interest in the issues raised in this application**

23. As the supervisory bodies responsible for providing independent review of government decisions on access to information under their home statutes, and ensuring that public bodies

comply with their disclosure obligations, the commissioners have a genuine interest in the issues raised in this application. The nature of this interest is set out below.

24. Access legislation is implicated under the derivative right of access protected at s. 2(b) of the *Charter* as a facet of freedom of expression. All commissioners have a genuine interest in this Court's determination with respect to the scope of the derivative right and issues raised in this application concerning the alleged infringement of the right, as this will impact on their decisions interpreting and applying the access provisions of their home statutes.

25. Administrative tribunals are obliged to apply *Charter* values in the exercise of their statutory discretion wherever such an issue is properly raised.<sup>19</sup> The Supreme Court of Canada has held that specialized tribunals with expertise and authority to decide questions of law are in the best position to hear and decide issues concerning the constitutionality of provisions of their home statutes and have the authority to do so at first instance.<sup>20</sup> While not all commissioners have binding decision-making authority, all will be affected by the Court's ruling on the issue under s. 2(b) of the *Charter* in exercising their reviewing authority.

26. The commissioners have a genuine interest in the due administration of justice under their home statutes and in ensuring that the statutes' purposes are fulfilled and not frustrated by the actions of government. Further, they have an interest in the constitutional validity of legislation which limits the independent supervisory authority of their offices and/or the courts in reviewing the decisions of public bodies on access to information.

27. The ruling of this Court on the validity of legislation retroactively authorizing the destruction of records subject to an access request, expunging the right of access to such records,

<sup>19</sup> *Doré v. Barreau du Québec*, 2012 SCC 12.

<sup>20</sup> *R. v. Conway*, 2010 SCC 22.

removing the jurisdiction of a commissioner or a court under the statute to review the denial of access, and immunizing government officials from civil liability or prosecution under the legislation, is of profound concern to the commissioners. Should the constitutional validity of these measures be upheld, the implications for access legislation will be nationwide. The rights of access, the independent reviewing authority of the commissioners and/or the courts, and the enforcement mechanism under the statutes will be significantly affected by the outcome of the application.

28. The legislatures of the various provincial and territorial jurisdictions have from time to time amended the access statutes or have enacted related legislation to exclude specific public bodies or types of records from the application of the legislation and/or to limit the commissioners reviewing authority or ancillary powers. While many such amendments will not raise constitutional issues, all commissioners have a genuine interest in addressing argument to the court with respect to the principles by which the determination of constitutional validity is made, particularly in relation to retroactive or retrospective legislation.

29. Issues involving the retroactive or retrospective effect of legislation are of current interest to my office. The *Building Ontario Up Act (Budget Measure)*, 2015 amends *FIPPA*<sup>21</sup> to provide that it no longer applies to Hydro One after the date it received Royal Assent.<sup>22</sup> The impact of this amendment is mitigated in part by transition provisions under which my office may continue to exercise its powers of inquiry and Hydro One continues to have duties under *FIPPA* for a period of six months following Royal Assent. Further, my office continues to have the power and duty to make orders binding on Hydro One for an additional period of six months. This amendment affects the right of access to records created prior to the date it received Royal

<sup>21</sup> By adding *Ontario FIPPA*, s 65.3(2).

<sup>22</sup> *Building Ontario Up Act (Budget Measure)*, SO 2015, c 20, Sch 28.

Assent, as well as the duties of Hydro One and the powers and duties of my office relating to requests for such records.

30. The Court should be cognizant of the access to information statutes across Canada and take into account the potential impact its judgment may have on the rights of access and oversight and enforcement mechanisms in those statutes. In the absence of hearing from the commissioners, the Court's ruling may have unintended consequences in those other jurisdictions.

**The commissioners will bring a different perspective to the Court grounded in their unique experience and expertise**

31. The commissioners have a wealth of experience and specialized expertise administering access legislation in accordance with its central purpose, to facilitate democracy and hold governments accountable. All commissioners serve the vital role of providing independent review of government decisions in furtherance of those purposes. Central to their mandates are issues pertaining to: (1) the disclosure of government held records necessary for meaningful discussion on matters of public interest and importance; and (2) constraints on the disclosure of information which is privileged or could interfere with the proper functioning of government.

32. As lead intervener for the purpose of making submissions on behalf of the various commissioners, my office will bring to the Court experience and expertise which has proven useful to the courts on several occasions. My office has appeared as an intervener before this Court, the Ontario Court of Appeal, the Federal Court of Appeal and the Supreme Court of Canada and has made submissions that were of assistance to the court and distinct from the submissions of other parties in the following cases:

- (i) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, concerning the right of access to government-held information as a derivative

right under the freedom of expression at s. 2(b) of the *Charter*;

- (ii) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 concerning the constitutional validity of legislation found to be in breach of s. 2(b) of the *Charter* by restricting the collection of information in the course of lawful picketing;
- (iii) *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, concerning the grant of an order permitting a minor to proceed anonymously in a case implicating her privacy rights;
- (iv) *R. v. Emms*, 2012 SCC 74, *R. v. Yumnu*, 2012 SCC 73, *R. v. Davey*, 2012 SCC 75, concerning the collection and use of personal information in the jury selection process;
- (v) *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (jointly with the British Columbia Information and Privacy Commissioner) concerning a commissioner's authority to abridge solicitor-client privilege;
- (vi) *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, concerning a municipality's authority to collect personal information only where necessary for a lawfully authorized purpose;
- (vii) *Tadros v. Peel Regional Police Service*, 2009 ONCA 442, concerning the authority of police to collect and disclose personal information in the course of a records check;
- (viii) *Canada (Office of the Information Commissioner) v. Canada (National Defence)*, 2015 FCA 56, concerning the jurisdiction of the Federal Court to review a decision by a government institution to extend the time limit for response to a

request under the *ATIA*.

(ix) *Reference re Municipal Freedom of Information and Protection of Privacy Act*, 2011 ONSC 1495, concerning an application by municipal councilors seeking access to personal information of their constituents; and

(x) *London Property Management Assn. v. London (City)*, 2011 ONSC 4710, concerning the issue whether information identifying individual landlords is “personal information” within the meaning of *MFIPPA*.

**The commissioners’ submissions will be useful and different**

33. If granted leave to intervene, the commissioners will make submissions on the hearing of the application that will be of assistance to the Court and that will be different from those of the parties and any other interveners, as set out below.

**The derivative right of access under s. 2(b)**

34. The commissioners will submit that the retroactive expungement of statutory rights of access to government held information has the potential to substantially impede meaningful discussion on matters of public interest or importance, by depriving the public of the right to know the factual underpinnings of government activities or policies. Such action thereby impinges on the derivative right of access to government held records under s. 2(b) and, to be valid, must be justified under s. 1 of the *Charter*.

35. The commissioners will make submissions on the scope of protection afforded to the derivative right of access, with particular reference to the statutes they administer. These submissions will be grounded in the test established by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.<sup>23</sup>

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<sup>23</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 33.

36. The determination whether there is a derivative right of access to government records under s. 2(b) in a given case engages three levels of inquiry:

- (i) The claimant must establish that the denial of access to the records effectively precludes meaningful commentary on a matter of public interest or importance. If this is shown, there is a *prima facie* case for their production.
- (ii) If a *prima facie* case for production is made out, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production (i.e., where the records are protected by privilege or their production would interfere with the proper functioning of affected institutions).
- (iii) If the second step is met, the s. 2(b) right is engaged, and the claimant must then show that government action infringes that right in purpose or effect.

37. With reference to the first level of inquiry, the commissioners will make submissions as follows:

- (i) There is no "subject matter" test for the expressive content of the derivative right of access. Matters of "public interest" or "public importance" are concepts that should be applied broadly so as not to unduly restrict the range of government activity, or government-regulated activity, which may properly be the subject of the intended expression.
- (ii) There is no requirement that the content of the expressive activity be of "compelling" public interest or "superordinate" importance to the public at large, provided it can be shown to be of substantial interest or importance to a significant segment of the public.<sup>26</sup>

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<sup>26</sup> Order P-1398, [1997] O.I.P.C. No. 138 at paras 37-40, quashed on judicial review in *Ontario (Ministry of*

38. With reference to the second level of inquiry, the commissioners will submit that a consideration of the public interest in the disclosure of records necessarily entails consideration of any public interest in non-disclosure.<sup>27</sup> In a statutory access to information context,

- (i) the public interest in non-disclosure is reflected in exemptions from the right of access for records that are privileged or would interfere with the functioning of government if disclosed; and
- (ii) the public body resisting disclosure generally bears the onus of establishing that an exemption from the right of access applies.<sup>28</sup>

The commissioners will submit that, where the test under the first level of inquiry has been met and no statutory exemption or privilege has been found to apply, the public body resisting disclosure, and not the claimant, should bear the onus of demonstrating a countervailing public interest in non-disclosure.

39. With reference to the third level of inquiry, the commissioners will submit that it is sufficient that the claimant show that government or legislative action has effectively denied access to the records sought. Legislation retroactively removing the right of access, or government action destroying records subject to the derivative right of access, is a particularly egregious infringement of the s. 2(b) protection.

40. With reference to the first two levels of inquiry, the commissioners will refer the court to examples of records containing factual, statistical or empirical information which have been ordered disclosed under provincial access statutes where such disclosure:

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*Finance) v. Ontario (Information and Privacy Commissioner)*, [1998] O.J. No. 420, but upheld in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484, specifically upholding Commissioner's interpretation of "compelling interest" at para 3.

<sup>27</sup> Order P-1190, [1996] O.I.P.C. No. 203, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal ref'd [1997] O.J. No. 694 (C.A.).

<sup>28</sup> *Ontario FIPPA*, s 53.

- (i) has proven necessary for meaningful commentary on matters of public interest or importance; and
- (ii) has not impinged on any privilege or interfered with the effective functioning of government.

41. In the commissioners' submission, these examples will assist the Court in identifying the types of cases and range of circumstances in which access to factual material is necessary to meaningful discussion on matters of public interest and may be protected by the derivative right of access under s. 2(b), consistent with the principles recognized by the Court in the *Criminal Lawyers' Association* case.

42. A sampling of such cases in four of the commissioners' jurisdictions include the following:

**Ontario**

- (i) Order PO-1398<sup>29</sup> ordering the disclosure of all or portions of economic studies and empirical data prepared by the Ministry of Finance showing the effect on the Ontario economy of a "Yes" vote in the 1995 referendum on Quebec separation from Canada. Attached as Exhibit "A" to this affidavit are media reports on the subject matter of the records.
- (ii) Order P-1190<sup>30</sup> ordering the disclosure of the results of a peer evaluation program relating to the safety of Ontario Hydro's nuclear facilities. Attached as Exhibit "B" to this affidavit are media reports on the subject matter of the records. Attached as Exhibit "C" to this affidavit is an extract from Hansard recording

<sup>29</sup> Order PO-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* [1998] OJ No 420, aff'd [1999] OJ No 484, leave to appeal ref'd (January 20, 2000), Doc. 27191 (SCC).

<sup>30</sup> Order PO-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal ref'd [1997] O.J. No. 694 (C.A.).

debates in the legislature on the same subject matter

(iii) Order MO-1989<sup>31</sup> ordering the disclosure of two electronic databases spanning a period of years containing anonymized information on individuals with whom the police have had contact, that was used by a media reporter to document racial profiling by Toronto police. Attached as Exhibit "D" to this affidavit is a series of media and other reports on the subject matter of the records.

(iv) Order PO-2811<sup>32</sup> ordering the disclosure of statistics listing the numbers of registered sex offenders residing within the geographic areas encompassed by the first three digits of the postal codes in Ontario. Attached as Exhibit "E" to this affidavit is a series of media reports on the subject matter of the records.

#### **British Columbia**

(v) Order F10-06<sup>33</sup> ordering the Ministry of Agriculture and Lands to disclose the results of random audits related to the presence of disease on fish farms. Attached as Exhibit "F" to this affidavit is a series of media reports on the subject matter of the records and related Bills referred to below. Attached as Exhibit "G" to this affidavit are public letters written by the Commissioner to the Minister of Agriculture commenting critically on amendments to the British Columbia *Animal Health Act*<sup>34</sup> tabled in response to Order F10-06. Attached as exhibit "H" to this affidavit are extracts from Hansard recording debates in the legislature on

<sup>31</sup> Order MO-1989 quashed on judicial review in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 225 OAC 238, rev'd 2009 ONCA 20.

<sup>32</sup> Order PO-2811 upheld on judicial review in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 3525 (Div. Ct.); aff'd 2012 ONCA 393 (C.A.); aff'd 2014 SCC 31.

<sup>33</sup> Order F10-06, 2010 BCIPC.9 (CanLII).

<sup>34</sup> *Animal Health Act*, SBC 2014, c 16.

45. The commissioners will submit that legislation which retroactively expunges statutory rights of access and ousts their and/or the courts' jurisdiction to independently review government decisions on access to information, denies access to justice and impinges on the constitutional principles of judicial and/or tribunal independence and the rule of law.

46. There is judicial recognition that tribunal independence may warrant a measure of constitutional protection in light of the increased role tribunals play in the administration of justice and the protection of values underlying the Constitution.<sup>38</sup> The three elements of judicial and tribunal independence are: financial security, security of tenure and administrative independence.<sup>39</sup>

47. The facet of judicial and tribunal independence implicated in this application is the principle of administrative independence, which refers to control by the court or the tribunal "over the administrative decisions that bear directly and immediately on the exercise of the judicial function."<sup>40</sup> Administrative independence requires that the court or tribunal be free from external interference by government, which affects its ability to fulfil its assigned functions independently according to law. In the commissioners' submission, administrative independence is impaired by government action which impedes or negates the decision of a court or tribunal to invoke its jurisdiction to hear and determine a dispute that is properly before it.

48. Where Parliament or a government body acts to affect the reviewing authority of a court or tribunal so radically as to retroactively remove that authority in its entirety in relation to particular classes of records or access disputes, the interference with administrative independence is self-evident and complete. A reasonable and right-minded person who has

<sup>38 39</sup> *Ell v. Alberta*, 2003 SCC 35 at paras. 22, 30-32; *Ontario Deputy Judges Assn. v. Ontario (Attorney General)*, 2011 ONSC 6956 at para 30, aff'd 2012 ONCA 437; *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372 at para 95, aff'd 2007 BCCA 507, leave to appeal ref'd (April 24, 2008), Doc. 32398 (SCC).

<sup>39</sup> *R. v. Valente*, [1985] 2 S.C.R. 673 at paras. 27 to 52.

<sup>40</sup> *Ibid.*, at para 52.

invoked the particular dispute resolution process would have a reasonable apprehension that his or her rights will not be determined independently.<sup>41</sup>

49. The commissioners are in general agreement with the position the applicants have advanced in this application with respect to the constitutional principles of the rule of law.<sup>42</sup> The commissioners do not propose to make submissions of law in this respect beyond those appearing in the applicant's application record and will adopt those submissions as their own.

50. The commissioners will refer the court to examples of legislative and/or regulatory amendments affecting the application of access statutes to specific public bodies or types of records, including the following:

- (i) The British Columbia *Animal Health Act*,<sup>43</sup> which superseded B.C.'s *FIPPA* and effectively removed from the right of access a class of records ordered disclosed by the Commissioner in Order F10-06.
- (ii) The *Building Ontario Up Act (Budget Measure), 2015*,<sup>44</sup> amending *FIPPA* to provide that it no longer applies to Hydro One.

#### **Order requested**

51. The commissioners seek an order granting them leave to intervene in this application as friends of the court, including the right to file a factum not exceeding 20 pages in length and the right to make oral argument not exceeding 30 minutes on the hearing of the application.

52. In addition, the commissioners seek an order granting them leave to file in the application an affidavit limited to appending as exhibits the material referred to at paragraph 42 of this

<sup>41</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1 at para 80; *Hewat v. Ontario*, [1998] O.J. No. 802 at para 21.

<sup>42</sup> Affidavit of Lorne Sossin, affirmed September 21, 2015, Supplemental Application Record of the Applicants Vol.

4, *Information Commissioner of Canada v Canada (AG)* Court File 15-64739.

<sup>43</sup> *Animal Health Act*, SBC 2014, c 16.

<sup>44</sup> *Building Ontario Up Act (Budget Measure), 2015*, SO 2015, c 20, Sch 28.

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<sup>43</sup> *Animal Health Act*, SBC 2014, c 16.

<sup>44</sup> *Building Ontario Up Act (Budget Measure), 2015*, SO 2015, c 20, Sch 28.

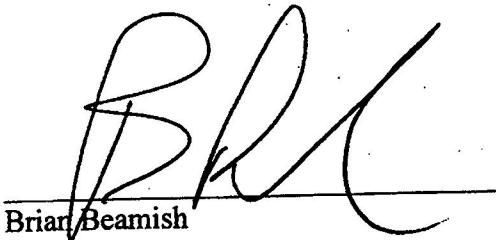
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affidavit, not as proof of their contents, but to show public discussion in response to the release of information.

53. The commissioners do not seek costs and seek an order that costs of this motion or of the application not be ordered against them.

SWORN BEFORE ME at the )  
City of Toronto, in the Province )  
of Ontario, this 9th day of November, 2015. )



Brian Beamish



William S. Challis  
A Commissioner of Oaths, etc.

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Court File No. 15-64739

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) DAY THE DAY  
JUSTICE CHARLES HACKLAND ) OF 2015

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants  
and

**ATTORNEY GENERAL OF CANADA**

Respondent

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**ORDER  
(LEAVE TO INTERVENE)**

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THIS MOTION brought by the Information and Privacy Commissioner of Ontario (the "Ontario Commissioner"), Alberta Information and Privacy Commissioner, British Columbia Information and Privacy Commissioner, Manitoba Ombudsman, Newfoundland and Labrador Information and Privacy Commissioner, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner, Nunavut Information and Privacy Commissioner, Prince Edward Island Information and Privacy Commissioner, Commission d'accès à l'information du Quebec, Saskatchewan Information and Privacy

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Commissioner, and Yukon Ombudsman and Information And Privacy Commissioner (together the "commissioners") for an order granting the commissioners leave to intervene in this application as friends of the court was read this day at 161 Elgin Street, Ottawa, Ontario.

UPON READING the Motion Record and Factum of the commissioners, and the factums of the applicants and the respondent, all filed,

1. THIS COURT ORDERS that the commissioners are granted leave to intervene as friends of the court on the terms that they will make submissions through the office of the Ontario Commissioner and will not seek to make separate submissions,
2. THIS COURT ORDERS that the commissioners are granted leave to file an affidavit appending as exhibits the material referred to in paragraph 42 of the affidavit of Brian Beamish sworn November 9, 2015;
3. THIS COURT ORDERS that the commissioners are granted leave to file a factum not exceeding 20 pages and leave to make argument to the court on the hearing of the application not exceeding 30 minutes,
4. THIS COURT ORDERS that the commissioners shall neither seek nor be liable for costs in connection with the intervention in this application,
5. THIS COURT ORDERS that there shall be no costs of this motion.
6. Such further and other order as to this Honourable Court seems just.

**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

**Court File No. 15-64739**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT: Ottawa

**O R D E R**

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Court File No. 15-64739

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants

and

**ATTORNEY GENERAL OF CANADA**

Respondent

---

**FACTUM OF THE MOVING PARTIES**

**INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, ALBERTA  
INFORMATION AND PRIVACY COMMISSIONER, BRITISH COLUMBIA  
INFORMATION AND PRIVACY COMMISSIONER, MANITOBA OMBUDSMAN,  
NEWFOUNDLAND AND LABRADOR INFORMATION AND PRIVACY  
COMMISSIONER, NORTHWEST TERRITORIES INFORMATION AND PRIVACY  
COMMISSIONER, NOVA SCOTIA INFORMATION AND PRIVACY  
COMMISSIONER, NUNAVUT INFORMATION AND PRIVACY COMMISSIONER,  
PRINCE EDWARD ISLAND INFORMATION AND PRIVACY COMMISSIONER,  
COMMISSION D'ACCÈS À L'INFORMATION DU QUÉBEC, SASKATCHEWAN  
INFORMATION AND PRIVACY COMMISSIONER, AND YUKON OMBUDSMAN  
AND INFORMATION AND PRIVACY COMMISSIONER**

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**(ON THE MOTION FOR LEAVE TO INTERVENE)**

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**INFORMATION AND PRIVACY  
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Solicitor for the Respondent, Attorney General of Canada

Court File No. 15-64739

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT**

Applicants

and

**ATTORNEY GENERAL OF CANADA**

Respondent

**FACTUM OF THE MOVING PARTIES**

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, ALBERTA INFORMATION AND PRIVACY COMMISSIONER, BRITISH COLUMBIA INFORMATION AND PRIVACY COMMISSIONER, MANITOBA OMBUDSMAN, NEWFOUNDLAND AND LABRADOR INFORMATION AND PRIVACY COMMISSIONER, NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER, NOVA SCOTIA INFORMATION AND PRIVACY COMMISSIONER, NUNAVUT INFORMATION AND PRIVACY COMMISSIONER, PRINCE EDWARD ISLAND INFORMATION AND PRIVACY COMMISSIONER, COMMISSION D'ACCÈS À L'INFORMATION DU QUÉBEC, SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER, AND YUKON OMBUDSMAN AND INFORMATION AND PRIVACY COMMISSIONER

(ON THE MOTION FOR LEAVE TO INTERVENE)

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## PART I: NATURE OF THE MOTION

### A. The moving parties

1. The moving parties are information and privacy commissioners appointed under the access to information legislation of their respective provinces and territories with the responsibility of providing independent review of government decisions on access to government held records (the “commissioners”). The access to information statutes they administer are substantially similar to the federal *Access to Information Act (“ATIA”)*<sup>1</sup> at the centre of this application.
2. The commissioners seek leave to intervene in this application as friends of the Court. All commissioners moving for intervener status have authorized the Information and Privacy Commissioner of Ontario (the “Ontario Commissioner”) to bring this motion on their behalf and to make the submissions set out below. The commissioners have agreed that the Ontario Commissioner will take the lead role in making joint submissions to the Court should leave to intervene be granted and that they will not seek to make separate submissions to the Court.<sup>2</sup>

### B. Overview

3. The application to this Court raises issues of fundamental importance concerning: (1) infringement of the derivative right of access to government held records as a facet of the freedom of expression protected at s. 2(b) of the *Charter*; and (2) violation of constitutional principles of the rule of law and judicial independence. These issues arise in the context of government action and retroactive legislation which has denied the right of access to government held information of public interest and importance and has ousted the authority of the

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<sup>1</sup> *Access to Information Act*, RSC 1985, c A-1.

<sup>2</sup> Affidavit of Brian Beamish sworn November 9, 2015, para. 4, Motion Record, Tab 2 at p. 14 [“Beamish affidavit”].

Information Commissioner of Canada and the Federal Court to independently review and remedy the matter as provided under the *ATIA*.

4. As the officers charged with independently reviewing government decisions under similar access to information legislation in the various provinces and territories of Canada, the commissioners have a genuine and substantial interest in the issues raised in this application. The Court's ruling on the constitutional issues is likely to have a significant impact on the rights of access and the administration of justice under the commissioners' home statutes. The commissioners have the experience and expertise to provide assistance to the Court on the issues raised that is distinct from the immediate parties.

## PART II - THE FACTS

### A. The issues raised in the application

5. In this application, the Information Commissioner of Canada (ICC) and Bill Clennett (the "applicants") seek declaratory and other relief relating to the destruction of the Long-gun Registry (the "registry") under the *Ending the Long-gun Registry Act (ELRA)*<sup>3</sup> which came into effect on April 5, 2012. At the time the applicants brought this application, partial destruction of the Registry had already taken place despite the existence of a pre-existing and "well-founded" request under the *ATIA* for access to the entire registry. The application raises constitutional issues under s. 2(b) of the *Charter* (access as a derivative right under freedom of expression) and the constitutional principles of the rule of law and judicial independence.<sup>4</sup>

6. More specifically, the applicants seek declarations of invalidity for subsequent amendments to ss. 29 and 30 of the *ELRA* made pursuant to the *Economic Action Plan 2015 Act*,

<sup>3</sup> *An Act to amend the Criminal Code and the Firearms Act*, SC 2012, c 6.

<sup>4</sup> Beamish affidavit, para. 6, Motion Record, Tab 2 at p. 15.

No. 1 (EAP)<sup>5</sup> which came into force on June 23, 2015. Those amendments:

- (i) retroactively authorize the destruction of records in the registry despite the existence of a valid access request and ongoing judicial review brought by the ICC;
- (ii) retroactively exclude the application of the *ATIA* with respect to the destruction of records in the registry;
- (iii) retroactively immunize the Crown, Crown servants and the Commissioner of Firearms for any administrative, civil or criminal proceedings with respect to the destruction of information in the registry, as well as for any act or omission done in purported compliance with the *ATIA* in relation to information from the registry in the Canadian Firearm Registry; and,
- (iv) oust the jurisdiction of the Federal Court to decide the ICC's application under s. 42(1)(a) of the *ATIA*.<sup>6</sup>

7. The applicants claim that the amended sections 29 and 30 of the *ELRA* infringe or deny the applicant Bill Clennett's right to freedom of expression under s. 2(b) of the *Charter*, including the derivative right of access to government documents. They further argue that this infringement is not justified under s. 1 of the *Charter* and that, by virtue of s. 52 of the *Constitution Act, 1982*, ss. 29 and 30 of the amended *ELRA* are of no force or effect. The applicants also claim that the retroactive nature of the amendments to the *ELRA*, which oust the jurisdiction of the Federal Court and immunize officials who may have wilfully violated the *ATIA*, violates constitutional principles of the rule of law and judicial independence.<sup>7</sup>

<sup>5</sup> *Economic Action Plan 2015 Act, No. 1, SC 2015, c 36.*

<sup>6</sup> Beamish Affidavit, para. 7, Motion Record, Tab 2 at pp. 15-16.

<sup>7</sup> Beamish Affidavit, para. 8, Motion Record, Tab 2 at p. 16

**B. The commissioners and their mandates under public sector access statutes**

8. This motion is brought by and on behalf of the twelve (12) provincial and territorial information and privacy commissioners named herein as moving parties.<sup>8</sup>

9. The access to information statutes of their respective provinces and territories are substantially similar to the *ATIA* and to one another. Each provides for a right of access to records held by a public body, exemptions from the right of access, mandatory or discretionary public interest disclosures, request and government decision-making processes, exclusions from the scope of the statute and offence provisions for interfering with the rights and processes under the statute. These statutes share the common purposes of facilitating democracy and government accountability through an informed citizenry and, to that end, providing for independent review of government decisions on access to information.<sup>9</sup>

10. The commissioners are charged with performing independent review functions under the statutes. For the most part, they are appointed by or on the recommendation of the legislatures of

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<sup>8</sup> Beamish Affidavit, para. 3, Motion Record, Tab 2 at pp. 13-14; Information and Privacy Commissioner of Ontario (Brian Beamish) appointed under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31; Alberta Information and Privacy Commissioner (Jill Clayton) appointed under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25; British Columbia Information and Privacy Commissioner (Elizabeth Denham) appointed under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165; Manitoba Ombudsman (Charlene Paquin) appointed under the *Ombudsman Act*, CCSM c O45 with responsibility for the *Freedom of Information and Protection of Privacy Act*, CCSM c F175; Newfoundland and Labrador Information and Privacy Commissioner (Ed Ring) appointed under the *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 and responsible for the *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2; Northwest Territories Information and Privacy Commissioner (Elaine Keenan Bengts) appointed under the *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20; Nova Scotia Information and Privacy Commissioner (Catherine Tully) appointed under the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5; Nunavut Information and Privacy Commissioner (Elaine Keenan Bengts) appointed under the *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20; Prince Edward Island Information and Privacy Commissioner (Karen A. Rose) appointed under the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01; Commission d'accès à l'information du Québec (Jean Chartier, Président) appointed under *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1; Saskatchewan Information and Privacy Commissioner (Ronald J. Kruzeniski) appointed under the *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01; Yukon Ombudsman and Information and Privacy Commissioner (Diane McLeod-McKay) appointed under the *Access to Information and Protection of Privacy Act*, RSY 2002, c 1.

<sup>9</sup> Beamish Affidavit, paras. 10-13, 16-17, Motion Record, Tab 2 at pp. 16-20.

their province or territory and serve as officers of their legislatures independent of government.<sup>10</sup>

11. All access statutes establish dispute resolution mechanisms by which appeals or complaints concerning the decisions of public bodies on access to records may be filed with the commissioners by requesters and/or third parties. The commissioners are given necessary powers to carry out their dispute resolution functions, which typically include the power to investigate and conduct a review of the matter, require production of records, enter and inspect premises, summon and examine witnesses, and receive evidence and representations from the parties.<sup>11</sup>

12. The various statutes differ in the authority given to the commissioners to resolve access disputes. There are two functional models. Québec, British Columbia, Alberta, Prince Edward Island and Ontario adopt an adjudicative model by which commissioners have the authority to make binding orders for the disclosure of records that are not exempt or excluded. These orders are subject to either appeal or judicial review in the superior court.<sup>12</sup>

13. Saskatchewan, Nova Scotia, Yukon, Northwest Territories and Nunavut incorporate a "report and recommendation" model, similar to the *ATIA*. In this model, the commissioners have authority to investigate and report on their findings and make recommendations to a public body to comply with its disclosure obligations, but have no order-making authority. In this model, adjudicative and order-making authority typically resides with the superior court of each jurisdiction.<sup>13</sup>

14. Two provinces have hybrid models. The Manitoba Ombudsman may refer certain matters to an adjudicator with authority to make binding orders; other matters may be appealed directly

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<sup>10</sup> Beamish Affidavit, para. 14, Motion Record, Tab 2 at p. 19.

<sup>11</sup> Beamish Affidavit, para. 15, Motion Record, Tab 2 at p. 19.

<sup>12</sup> Beamish Affidavit, paras. 12,18, Motion Record, Tab 2 at pp. 17-18, 20.

<sup>13</sup> Beamish Affidavit, para. 19, Motion Record, Tab 2 at p. 21.

to the superior court. The Newfoundland and Labrador statute requires a public body to comply with the commissioner's recommendations unless it brings an application to the superior court.<sup>14</sup>

**C. The commissioners' interest in the issues raised in the application**

15. As the officers responsible for providing independent review of government decisions on access to information under their home statutes, the commissioners have a real and substantial interest in the issues raised in this application.<sup>15</sup>

16. Access legislation is implicated under the derivative right of access protected at s. 2(b) of the *Charter* as a facet of freedom of expression. All commissioners have a genuine interest in this Court's determination with respect to the scope of the derivative right, the alleged infringement of the right and the justification for any infringement, as this will impact on their decisions interpreting and applying the right of access provisions of their home statutes.<sup>16</sup>

17. The commissioners have a genuine interest in the due administration of justice under their home statutes and in ensuring that the statutes' purposes are fulfilled and not frustrated by the actions of government. Further, they have an interest in the constitutional validity of legislation which limits the independent supervisory authority of their offices and/or the courts in reviewing the decisions of public bodies on access to information.<sup>17</sup>

18. The ruling of this Court on the validity of legislation retroactively authorizing the destruction of records subject to an access request, expunging the right of access to such records, removing the jurisdiction of a commissioner or a court to review the denial of access, and immunizing government officials from civil liability or prosecution, is of profound concern to

<sup>14</sup> Beamish Affidavit, para. 20, Motion Record, Tab 2 at p. 21.

<sup>15</sup> Beamish Affidavit, para. 23, Motion Record, Tab 2 at pp. 21-22.

<sup>16</sup> Beamish Affidavit, para. 24, Motion Record, Tab 2 at p. 22.

<sup>17</sup> Beamish Affidavit, para. 26, Motion Record, Tab 2 at p. 22.

the commissioners. Should the constitutional validity of these measures be upheld, the implications for access legislation will be nationwide. The rights of access, the independent reviewing authority of the commissioners and/or the courts, and the enforcement mechanisms under the statutes will be significantly affected by the outcome of the application.<sup>18</sup>

19. The legislatures of various provinces and territories may, from time to time, amend the access statutes or enact related legislation to exclude specific public bodies or types of records from the application of access to information legislation and/or to limit the commissioners' reviewing authority or ancillary powers. All commissioners have a genuine interest in addressing argument to the Court on the principles by which the determination of constitutional validity of such measures is made, particularly in relation to retroactive or retrospective legislation.<sup>19</sup>

**D. The commissioners will bring a distinct perspective to the Court grounded in their experience and expertise**

20. The commissioners have considerable experience and specialized expertise administering access to information legislation in accordance with its central purpose, to facilitate democracy and hold governments accountable. All commissioners serve the vital role of providing independent review of government decisions in furtherance of those purposes. Central to their mandates are issues pertaining to: (1) the disclosure of government held records necessary for meaningful discussion on matters of public interest or importance; and (2) constraints on the disclosure of information which is privileged or could interfere with the proper functioning of government.<sup>20</sup>

21. As lead intervener on behalf of the commissioners, the Ontario Commissioner has

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<sup>18</sup> Beamish Affidavit, para. 27, Motion Record, Tab 2 at pp. 22-23.

<sup>19</sup> Beamish Affidavit, para. 28, Motion Record, Tab 2 at p. 23.

<sup>20</sup> Beamish Affidavit, para. 31, Motion Record, Tab 2 at p. 24.

experience and expertise which has proven useful to the courts on several occasions. The Ontario Commissioner has appeared as an intervener before this Court, the Ontario Court of Appeal, the Federal Court of Appeal and the Supreme Court of Canada and has made submissions of assistance to the court and distinct from the other parties in the following cases:<sup>21</sup>

- (i) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, concerning the right of access to government-held information as a derivative right under freedom of expression at s. 2(b) of the *Charter*;
- (ii) *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 concerning the constitutional validity of legislation found to be in breach of s. 2(b) of the *Charter* by restricting the collection of information in the course of lawful picketing;
- (iii) *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, concerning the grant of an order permitting a minor to proceed anonymously in a case implicating her privacy rights;
- (iv) *R. v. Emms*, 2012 SCC 74, *R. v. Yumnu*, 2012 SCC 73, *R. v. Davey*, 2012 SCC 75, concerning the impact of jury vetting on the rights of accused persons to a fair trial under ss. 7 and 11(d) of the *Charter*;
- (v) *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (jointly with the British Columbia Information and Privacy Commissioner) concerning a commissioner's authority to abridge solicitor-client privilege;
- (vi) *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, concerning a municipality's authority to collect personal information only where necessary for a lawfully authorized purpose;
- (vii) *Tadros v. Peel Regional Police Service*, 2009 ONCA 442, concerning the authority of police to collect and disclose personal information in the course of a records check;
- (viii) *Canada (Office of the Information Commissioner) v. Canada (National Defence)*, 2015 FCA 56, concerning the jurisdiction of the Federal Court to review a decision by a government institution to extend the time limit for response to a request under the *ATIA*;
- (ix) *Reference re Municipal Freedom of Information and Protection of Privacy Act*, 2011 ONSC 1495, concerning an application by municipal councillors seeking access to personal information of their constituents; and
- (x) *London Property Management Assn. v. London (City)*, 2011 ONSC 4710, concerning the issue of whether information identifying individual landlords is

<sup>21</sup> Beamish Affidavit, para. 32, Motion Record, Tab 2 at pp. 24-26.

"personal information" within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*.

22. If granted leave to intervene, the commissioners will make submissions that will be of assistance to the Court and different from the parties and other interveners, as set out below. The commissioners will not take a position on the ultimate disposition of the application.<sup>22</sup>

### PART III - ISSUES AND THE LAW

23. The issues to be decided on this motion are:

- (i) Whether the commissioners should be granted leave to intervene in this application; and
- (ii) If leave is granted, what terms should govern the commissioners' intervention.

#### A. General principles for granting leave to intervene

24. This Court's discretion to grant leave to intervene is governed by Rule 13 of the *Rules of Civil Procedure*, which sets out two bases upon which leave to intervene may be granted: (1) as an added party (under Rule 13.01); or (2) as a friend of the Court (under Rule 13.02). The commissioners seek leave to intervene under Rule 13.02, which provides:

Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.<sup>23</sup>

25. On a motion for leave to intervene, a court will consider "the nature of the case, the issues raised and the likelihood the proposed intervener is able to make a useful contribution to the resolution of the issues without causing injustice to the immediate parties."<sup>24</sup>

<sup>22</sup> Beamish Affidavit, para. 32, Motion Record, Tab 2 at p. 22.

<sup>23</sup> *Rules of Civil Procedure*, Rule 13.02.

<sup>24</sup> *Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (ON CA), pp. 4-5; *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824, at para.

26. In public interest and constitutional cases, where a judgment will often have a significant impact on persons who are not immediate parties to the proceedings, the courts have relaxed the traditional rules for participation by interveners.<sup>25</sup> As the Ontario Court of Appeal has observed, a successful intervener in a *Charter* case has usually met “at least one of three criteria”:

...it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with special expertise and a broadly identifiable membership base.<sup>26</sup>

Proposed interveners must still satisfy the basic requirement that their participation will make a useful and distinct contribution not otherwise offered by the parties.<sup>27</sup>

27. The fact that a proposed intervener may support one of the parties, and that their positions may overlap, is not a reason to deny intervener status. As the Court has observed, “where the prospective intervener is generally aligned with the position of one side, it can still make a useful contribution to the argument of the issues before the court”.<sup>28</sup>

28. The Court will be inclined to give favourable consideration to an application where a public body seeking intervener status has “special knowledge and expertise in the broader context of the legislation and its impact generally.” As stated in *Lafarge* with respect to the intervention of the Environmental Commissioner of Ontario:

When dealing with issues of public interest with potentially broad impact, it is useful for the Court to be aware of the broader context, even if not directly

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<sup>25</sup> *Ontario Human Rights Commission v. Christian Horizons*, 2008 CanLII 68129 (ON SCDC), at paras. 4-5, 12-13.

<sup>26</sup> *Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (ON CA), pp. 4-5; *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct), para. 6; *Jones v. Tsige* (2011), 2011 CanLII 99894 (ON CA), 106 O.R. (3d) 721 (C.A.).

<sup>27</sup> *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 (CanLII), para. 2; *Ontario Society for the Prevention of Cruelty to Animals*, *supra*, para. 8.

<sup>28</sup> *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct), para. 7.

<sup>29</sup> *Blue Mountain Resorts Limited v. Den Bok*, 2011 ONSC 1909 (CanLII), para. 11; *Regional Municipality of Peel*, *supra*, p. 4; *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.) at para. 9; *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct), para. 10.

applicable to the specific issues before it, particularly where the matters raised are novel and without previous judicial precedent.<sup>29</sup>

**B. This application raises constitutional issues of broad public importance**

29. The nature of this application and the issues it raises favour granting the commissioners leave to intervene. The application raises questions of fundamental importance concerning a breach of s. 2(b) of the *Charter* and the violation of constitutional principles of judicial independence and the rule of law. It concerns the public right of access to government held information of public interest and importance, the actions of government officials interfering with the exercise of that right, and retroactive legislation ousting the independent authority of the ICC and the Federal Court and immunizing public officials from liability and prosecution. The issues in the application thus “transcend[s] the dispute between the immediate parties”<sup>30</sup> and engage broader questions of public and constitutional importance.

**C. The commissioners have a real, substantial and identifiable interest in the issues raised by the application**

30. As set out above, the commissioners have a real, substantial and identifiable interest in the issues raised in this application. The Court’s ruling on the issues will have an impact on the manner in which the commissioners perform their statutory mandates, the ability of government officials to interfere with access rights and the commissioners’ functions, and the validity of legislation retroactively removing rights of access and restricting or removing the independent reviewing authority of the commissioners and/or the courts.

31. Administrative tribunals are obliged to apply *Charter* values in the exercise of their

<sup>29</sup> *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 1401 (Div. Ct.), paras. 11-13.

<sup>30</sup> *Childs v. Desormeaux*, [2003] O.J. No. 3800 (C.A.), para 10.

statutory discretion wherever such an issue is properly raised.<sup>31</sup> The Supreme Court of Canada has held that specialized tribunals with expertise and authority to decide questions of law are in the best position to hear and decide issues concerning the constitutionality of provisions of their home statutes and have the authority to do so at first instance.<sup>32</sup> While not all commissioners herein have binding decision-making authority, all will be affected by the Court's ruling on the issue under s. 2(b) of the *Charter* in exercising their reviewing authority.<sup>33</sup>

32. In the Commissioners' submission, the Court should be cognizant of the other access to information statutes in Canada and the potential impact its judgment may have on the rights of access and oversight and enforcement mechanisms in those statutes. Without hearing from the commissioners, the Court's ruling may have unintended consequences in their jurisdictions.<sup>34</sup>

**D. The commissioners' proposed submissions will bring an important and expert perspective distinct from the immediate parties and other interveners**

33. The courts have recognized the specialized expertise of the commissioners in interpreting and applying their home statutes and closely related legislation, and in striking an appropriate balance between the competing interests of the confidentiality needed for the effective functioning of government and the public's interest in transparent and open government.<sup>35</sup>

34. The commissioners will bring a distinct perspective to the issues that will assist the court in understanding:

- (i) the nature of the right of access to government held records under access to

<sup>31</sup> *Doré v. Barreau du Québec*, 2012 SCC 12.

<sup>32</sup> *R. v. Conway*, 2010 SCC 22.

<sup>33</sup> Beamish Affidavit, para. 25, Motion Record, Tab 2 at p. 22.

<sup>34</sup> Beamish Affidavit, para. 30, Motion Record, Tab 2 at p. 24

<sup>35</sup> *Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71 at paras. 7-8; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 26-27, 67; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para. 70; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.) at paras. 28-38.

information legislation and its relationship with the protection afforded to the derivative right of access under s. 2(b) of the *Charter*.

- (iii) the appropriate legal and factual approaches to be adopted in determining, in a given case, whether the derivative right of access is engaged, whether it has been breached and, if so, whether the breach is justified under s. 1; and
- (ii) the impact government action and retroactive legislation of the nature present in this application has on judicial and tribunal independence and the rule of law.

35. The commissioners' submissions will be of assistance to the Court in developing and expanding on the following points.

**(i) The derivative right of access under s. 2(b) of the *Charter***

36. The commissioners will submit that expungement of statutory rights of access to government held information has the potential to substantially impede meaningful discussion on matters of public interest or importance by depriving the public of knowledge of the factual underpinnings of government activities or policies. Such action impinges on the derivative right of access under s. 2(b) and, to be valid, must be justified under s. 1 of the *Charter*.<sup>36</sup>

37. The commissioners will make submissions on the scope of protection afforded to the derivative right of access, with particular reference to the statutes they administer. These submissions will be grounded in the test established in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, which engages three levels of inquiry:<sup>37</sup>

- (i) The claimant must establish that the denial of access to the records effectively precludes meaningful commentary on a matter of public interest or importance.

<sup>36</sup> Beamish Affidavit, para. 34, Motion Record, Tab 2 at p. 26.

<sup>37</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 33.

- (ii) If a *prima facie* case is made out, the claimant must show that the protection is not removed by countervailing considerations (i.e., where disclosure would breach privilege or interfere with the proper functioning of affected institutions).
- (iii) If the second step is met, the s. 2(b) right is engaged, and the claimant must then show that government action infringes that right in purpose or effect.<sup>38</sup>

38. With reference to the first level of inquiry, the commissioners will submit:<sup>39</sup>

- (i) There is no “subject matter” test for the derivative right. The test of “public interest or importance” should be applied broadly so as not to unduly restrict the range of government activity which may be the subject of protected expression.
- (ii) There is no requirement that the content of expressive activity be of “compelling” public interest or of “superordinate” importance, provided it can be shown to be of substantial interest or importance to a significant segment of the public.<sup>40</sup>

39. With reference to the second level of inquiry, consideration of the public interest in the disclosure of records necessarily entails consideration of any public interest in non-disclosure.<sup>41</sup>

In a statutory access to information context,

- (i) the public interest in non-disclosure is reflected in exemptions for records that are privileged or would interfere with the functioning of government if disclosed; and
- (ii) the public body resisting disclosure generally bears the onus of establishing that

<sup>38</sup> Beamish Affidavit, para. 36, Motion Record, Tab 2 at p. 27.

<sup>39</sup> Beamish Affidavit, para. 37, Motion Record, Tab 2 at p. 27

<sup>40</sup> Order P-1398, *Ministry of Finance*, [1997] O.I.P.C. No. 138 at paras 37-40, upheld in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.) at para 3, affirming the Commissioner’s interpretation of “compelling public interest”, leave to appeal ref’d (January 20, 2000), Doc. 27191 (SCC).

<sup>41</sup> Order P-1190, *Ontario Hydro*, [1996] O.I.P.C. No. 203, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal ref’d [1997] O.J. No. 694 (C.A.).

an exemption from the right of access applies.<sup>42</sup>

Where the test under the first level of inquiry has been met and no statutory exemption or privilege has been found to apply, the public body resisting disclosure, and not the claimant, should bear the onus of demonstrating a countervailing public interest in non-disclosure.<sup>43</sup>

40. With reference to the third level of inquiry, it is sufficient that the claimant show that government or legislative action has effectively denied access to the records sought, without discretionary or other recourse to disclosure in the public interest.<sup>44</sup> Legislation retroactively removing the right of access and oversight mechanisms in their entirety, or government action destroying the records, is a particularly egregious infringement of the s. 2(b) protection.<sup>45</sup>

41. With reference to the first two levels of inquiry, the commissioners will refer the Court to examples of records containing factual, statistical or empirical information which have been ordered disclosed under provincial or territorial access statutes where such disclosure:

- (i) has proven necessary for meaningful commentary on matters of public interest or importance; and
- (ii) has not impinged on any privilege or interfered with the effective functioning of government.<sup>46</sup>

42. These examples will assist the Court in identifying the types of cases and range of circumstances in which access to factual material is necessary to permit meaningful discussion on matters of public interest and may be protected by the derivative right of access under s.

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<sup>42</sup> *Ontario FIPPA*, s 53.

<sup>43</sup> Beamish Affidavit, para. 38, Motion Record, Tab 2 at p. 28.

<sup>44</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at paras. 41-52, where the Court held that the presence of a discretion to disclose an exempt record in the public interest mitigated any potential breach of s. 2(b) by the omission of certain exemptions from the public interest override.

<sup>45</sup> Beamish Affidavit, para. 39, Motion Record, Tab 2 at p. 28.

<sup>46</sup> Beamish Affidavit, para. 40, Motion Record, Tab 2 at pp. 28-29.

2(b).<sup>47</sup> A sampling of cases include: (i) economic impact studies on Québec separation;<sup>48</sup> (ii) peer review reports on the safety of nuclear facilities<sup>49</sup>; (iii) police databases used to document racial profiling;<sup>50</sup> (iv) statistics listing the numbers of registered sex offenders by postal code;<sup>51</sup> (v) audits documenting the presence of disease on fish farms;<sup>52</sup> (vi) a report on the sex trade industry;<sup>53</sup> and (vii) records documenting the death of children under provincial care.<sup>54</sup>

43. In connection with these examples, and to assist the Court with applying the first two levels of inquiry, the commissioners seek leave of the Court to file with their intervener materials in the main application an affidavit appending the exhibits referred to at paragraph 42 of the affidavit of Commissioner Brian Beamish filed with this motion.<sup>55</sup> The commissioners make further submissions below in relation to the order sought from the Court.

**(ii) Constitutional principles of judicial and tribunal independence and the rule of law**

44. The commissioners will make submissions with respect to issues of judicial and tribunal independence as follows.

45. A fundamental precept of access to information statutes throughout Canada is that the statutory reviewing mechanisms embodied in the offices of the commissioners and/or the courts are independent of the government of the day and the public body holding the requested

<sup>47</sup> Beamish Affidavit, paras. 41-42, Motion Record, Tab 2 at pp. 29-31.

<sup>48</sup> Order P-1398, *Ministry of Finance*, [1997] O.I.P.C. No. 138, upheld in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] OJ No 484, leave to appeal ref'd (January 20, 2000), Doc. 27191 (SCC).

<sup>49</sup> Order P-1190, *Ontario Hydro*, [1996] O.I.P.C. No. 203, upheld in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal ref'd [1997] O.J. No. 694 (C.A.).

<sup>50</sup> Order MO-1989, *Toronto Police Services Board*, [2005] O.I.P.C. No. 17, upheld in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

<sup>51</sup> Order PO-2811 *Ministry of Community Safety and Correctional Services*, [2009] O.I.P.C. No. 127, upheld in *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

<sup>52</sup> Order F10-06, *Ministry of Agriculture and Lands*, 2010 BCIPC 9 (CanLII).

<sup>53</sup> Report A-2015-003, *Women's Policy Office*, Newfoundland and Labrador OIPC, September 25, 2015.

<sup>54</sup> Order F2013-19, *Alberta Human Services*, 2013 CanLII 33222 (AB OIPC).

<sup>55</sup> Beamish Affidavit, para. 42, Motion Record, Tab 2 at pp. 29-31.

records.<sup>56</sup> The independence of the commissioners is enshrined in the purpose clauses of their home statutes and is assured by the terms of their appointment. This independence is a vital component of access to justice under the legislation.<sup>57</sup>

46. The commissioners will submit that legislation which retroactively expunges statutory rights of access and ousts their and/or the courts' jurisdiction to independently review government decisions on access to information, denies access to justice and impinges on the constitutional principles of judicial and/or tribunal independence and the rule of law.<sup>58</sup>

47. There is judicial recognition that tribunal independence may warrant a measure of constitutional protection in light of the increased role tribunals play in the administration of justice and the protection of values underlying the Constitution.<sup>59</sup>

48. The facet of judicial and tribunal independence implicated in this application is the principle of administrative independence, which refers to control by the court or the tribunal "over the administrative decisions that bear directly and immediately on the exercise of the judicial function."<sup>60</sup> Administrative independence requires that the court or tribunal be free from external interference by government, which affects its ability to fulfil its assigned functions independently according to law. In the commissioners' submission, administrative independence is impaired by legislative or government action which impedes or negates the decision of a court or tribunal to invoke its jurisdiction to hear and determine a dispute that is properly before it.<sup>61</sup>

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<sup>56</sup> *Ibid.*, fn 7.

<sup>57</sup> Beamish Affidavit, para. 44, Motion Record, Tab 2 at p. 31.

<sup>58</sup> Beamish Affidavit, para. 45, Motion Record, Tab 2 at p.

<sup>59</sup> *Ell v. Alberta*, 2003 SCC 35 at paras. 22, 30-32; *Ontario Deputy Judges Assn. v. Ontario (Attorney General)*, 2011 ONSC 6956 at para 30, aff'd 2012 ONCA 437; *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372 at para 95, aff'd 2007 BCCA 507, leave to appeal ref'd (April 24, 2008), Doc. 32398 (SCC).

<sup>60</sup> *R. v. Valente*, [1985] 2 S.C.R. 673 at paras. 27 to 52.

<sup>61</sup> Beamish Affidavit, para. 47, Motion Record, Tab 2 at p. 32.

49. Where Parliament or a government body acts to affect the reviewing authority of a court or tribunal so radically as to retroactively remove that authority in its entirety in relation to particular classes of records or access disputes, the interference with administrative independence is self-evident and complete. A reasonable and right-minded person who has invoked the particular dispute resolution process would have a reasonable apprehension that his or her rights will not be determined independently.<sup>62</sup>

50. The commissioners are in general agreement with the position the applicants have advanced in this application with respect to the constitutional principles of the rule of law.<sup>63</sup> The commissioners do not propose to make submissions of law in this respect beyond those appearing in the applicants' application record and will adopt those submissions as their own.

51. The commissioners will make submissions with respect to the principles by which a determination of the constitutional validity of retroactive or retrospective amendments affecting access to information legislation should be made.

52. The commissioners will refer the court to examples of legislative and/or regulatory amendments affecting the application of access statutes to specific public bodies or types of records, including the following:

- (i) The British Columbia *Animal Health Act*,<sup>64</sup> which superseded its *FIPPA* and effectively removed from the right of access a class of records ordered disclosed by the Commissioner in Order F10-06.

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<sup>62</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1 at para 80; *Hewat v. Ontario*, [1998] O.J. No. 802 at para 21.

<sup>63</sup> Affidavit of Lorne Sossin, affirmed September 21, 2015, Supplemental Application Record of the Applicants Vol. 4, *Information Commissioner of Canada v Canada (AG)* Court File 15-64739.

<sup>64</sup> *Animal Health Act*, SBC 2014, c 16.

(ii) The *Building Ontario Up Act (Budget Measure), 2015*,<sup>65</sup> amending *FIPPA* to provide that it no longer applies to Hydro One as of a specified date.

Notwithstanding the presence of transition provisions, amendments of this nature have retroactive or retrospective effect to the extent that they extinguish the right of access to records created prior to their effective date and remove the duties of public bodies and the oversight powers of commissioners or the courts in that connection.

**E. Terms governing the commissioners' intervention**

53. The commissioners seek intervener status as friends of the Court and have agreed to make joint submissions to the Court through the Ontario Commissioner. They will not seek to make separate submissions.<sup>66</sup> This manner of proceeding is sensible and expeditious. It avoids multiple motions for leave to intervene and potentially duplicative or inconsistent submissions by the commissioners. It will not cause injustice to the immediate parties.

54. In addition, the commissioners seek an order granting them leave to file an affidavit limited to appending as the exhibits the material referred at paragraph 42 of the affidavit of Brian Beamish filed in this motion, not as proof of their contents, but to show public discussion in response to the release of information under access legislation.<sup>67</sup>

55. This material, consisting of media reports, extracts from Hansard and two public letters from a commissioner to a government minister, is available in the public domain and is the type of material of which the Court might take judicial notice. It is not produced to add to the evidence concerning the immediate dispute between the parties, but for the sole purpose of assisting the Court in identifying the types of cases and circumstances in which access to factual

<sup>65</sup> *Building Ontario Up Act (Budget Measure), 2015*, SO 2015, c 20, Sch. 28.

<sup>66</sup> Beamish Affidavit, para. 4, Motion Record, Tab 2 at p. 14.

<sup>67</sup> Beamish Affidavit, paras. 42,52, Motion Record, Tab 2 at pp. 29-31, 33-34.

material is necessary to meaningful discussion on matters of public interest and may be protected by the derivative right of access under s. 2(b). In the Commissioners' submission, filing this material with the Court will not cause injustice to the immediate parties.

56. There are no judicial decisions in Canada which show how the disclosure of government information pursuant to an access statute has proven necessary for meaningful commentary on matters of public interest or importance. The assistance the commissioners can bring to the Court would be diminished if they could not provide the Court with examples from their experience which will shed light on this unexamined area.

57. This Court has previously granted the Ontario Commissioner intervener status as a friend of the Court under Rule 13.02 with permission to file affidavit evidence which was limited to the nature, structure and function of his office and did not attempt to address the factual merits of the application as asserted in the affidavit filed by the applicant in that case.<sup>68</sup> This limited affidavit evidence was used to assist the court in holding that the application was brought prematurely and should be dismissed.<sup>69</sup> In another case involving a motion for third party production, in the course of which interested parties were granted leave to intervene under Rule 13.02, this Court relied on affidavits filed in support of the intervention motions in deciding the production issue on the main motion.<sup>70</sup>

58. The material the commissioners propose to put before the Court does not address the factual merits of the application, but will assist the Court generally in understanding the contours of the derivative right issue.

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<sup>68</sup> Endorsement of Trotter J dated May 31, 2010, *City of Toronto*, Court File No. CV-10-3987216 (S.C.J.).

<sup>69</sup> *Ontario (Information and Privacy Commissioner) (Re)*, [2011] O.J. No. 1071 (S.C.J.)

<sup>70</sup> *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337 (S.C.J.) at paras. 55-73.

- 21 -

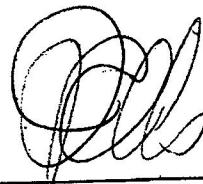
### PART III: ORDER REQUESTED

59. The commissioners respectfully request an order:

- (i) granting the commissioners leave to intervene as friends of the court on terms that they will make submissions through the office of the Ontario Commissioner and will not seek to make separate submissions;
- (ii) granting the commissioners leave to file an affidavit appending as exhibits the material referred to at paragraph 42 of the affidavit of Brian Beamish sworn November 9, 2015;
- (iii) granting the commissioners leave to file a factum not exceeding 20 pages and leave to make argument to the court on the hearing of the application not exceeding 30 minutes;
- (iv) that the commissioners shall neither seek nor be liable for costs in connection with their intervention in the application;
- (v) that there be no costs of this motion; and
- (vi) such further and other order as to this Honourable Court seems just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

November 10, 2015



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William S. Challis  
Counsel for the Moving Parties

## SCHEDULE "A" – AUTHORITIES

1. *Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (ON CA).
2. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824.
3. *Ontario Human Rights Commission v. Christian Horizons*, 2008 CanLII 68129 (ON SCDC).
4. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct).
5. *Jones v. Tsige* (2011), 2011 CanLII 99894 (ON CA), 106 O.R. (3d) 721 (C.A.).
6. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 (CanLII).
7. *Blue Mountain Resorts Limited v. Den Bok*, 2011 ONSC 1909 (CanLII).
8. *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.).
9. *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 1401 (Div. Ct.).
10. *Childs v. Desormeaux*, [2003] O.J. No. 3800 (C.A.).
11. *Doré v. Barreau du Quebec*, 2012 SCC 12.
12. *R. v. Conway*, 2010 SCC 22.
13. *Macdonell v. Quebec (Commission d'accès à l'information)*, 2002 SCC 71.
14. *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.
15. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.
16. *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.).
17. Order P-1398, [1997] O.I.P.C. No. 138,
18. *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal ref'd (January 20, 2000), Doc. 27191 (SCC).
19. Order P-1190, *Ontario Hydro*, [1996] O.I.P.C. No. 203.
20. *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal ref'd [1997] O.J. No. 694 (C.A.).
21. Order P-1398, *Ministry of Finance*, [1997] O.I.P.C. No. 138.

- 2 -

22. Order MO-1989, *Toronto Police Services Board*, [2005] O.I.P.C. No. 173.
23. *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.
24. Order PO-2811, *Ministry of Community Safety and Correctional Services*, [2009] O.I.P.C. No. 127.
25. Order F10-06, *Ministry of Agriculture and Lands*, 2010 BCIPC 9 (CanLII).
26. Report A-2015-003, *Women's Policy Office*, Newfoundland and Labrador OIPC, September 25, 2015.
27. Order F2013-19, *Alberta Human Services*, 2013 CanLII 33222 (AB OIPC).
28. *Ell v. Alberta*, 2003 SCC 35.
29. *Ontario Deputy Judges Assn. v. Ontario (Attorney General)*, 2011 ONSC 6956, aff'd 2012 ONCA 437.
30. *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, aff'd 2007 BCCA 507, leave to appeal ref'd (April 24, 2008), Doc. 32398 (SCC).
31. *R. v. Valente*, [1985] 2 S.C.R. 673.
32. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1.
33. *Hewat v. Ontario*, [1998] O.J. No. 802.
34. *City of Toronto*, Court File No. CV-10-3987216 (S.C.J.).
35. *Ontario (Information and Privacy Commissioner) (Re)*, [2011] O.J. No. 1071 (S.C.J.).
36. *Société Air France et al v. Greater Toronto Airports Authority*, [2009] O.J. No. 5337 (S.C.J.).

## SCHEDULE "B" – STATUTES

1. *Access to Information Act*, RSC 1985, c A-1.
2. *An Act to amend the Criminal Code and the Firearms Act*, SC 2012, c 6.
3. *Economic Action Plan 2015 Act, No. 1*, SC 2015, c 36.
4. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.
5. *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.
6. *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165.
7. *Ombudsman Act*, CCSM c O45.
8. *Freedom of Information and Protection of Privacy Act*, CCSM c F175.
9. *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1.
10. *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2.
11. *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20.
12. *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5.
13. *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20.
14. *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01.
15. *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1.
16. *Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01.
17. *Access to Information and Protection of Privacy Act*, RSY 2002, c 1.
18. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 13.01-13.02.

***RULES OF CIVIL PROCEDURE***  
**R.R.O. 1990, Reg. 194**

**Leave to Intervene as Added Party**

**13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg.

**Leave to Intervene as Friend of the Court**

**13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

INFORMATION COMMISSIONER OF CANADA  
and BILL CLENNETT

- and -

Applicants

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. 15-64739

ONTARIO  
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT: Ottawa

FACTUM OF THE MOVING PARTY  
INFORMATION AND PRIVACY  
COMMISSIONER OF ONTARIO  
(on the motion for leave to intervene).

INFORMATION AND PRIVACY  
COMMISSIONER OF ONTARIO  
1400 – 2 Bloor Street East  
Toronto, ON M4W 1A8

William S. Challis, LSUC #17366R  
Tel.: (416) 326-3921  
Fax: (416) 325-9186  
e-mail: bill.challis@ipc.on.ca

Counsel for the Moving Party  
Information and Privacy Commissioner of Ontario

09400

SERVICE OF A TRUE COPY HEREOF	
SIGNIFICATION DE COPIE CONFORME	
12	day jour
Nov. 2015	
<i>[Signature]</i>	
William S. Challis Deputy Attorney General of Ontario Information and Privacy Commissioner of Ontario et Secrétaire général du Canada	

**Page 484  
is not relevant  
est non pertinente**

**Deputy Minister's Office / Cabinet du Sous-Ministre**  
**Routing Slip / Feuille de contrôle**

**Letter Date / Date de Lettre:** Dep't #: 2015-013528

**Author/ Auteur:** Suzanne Legault  
Information Commissioner of Canada  
Office of the Information Commissioner of  
Canada  
112 Kent Street  
Ottawa ON K1A 1H3

**Doc Type / Type de doc:**  
**Due Date / Date d'échéance:**

<b>Assigned To / Assigné à:</b> PLS-ADM INFORMATION	s.23	<b>Asgn Date / Date assigné:</b> 11/25/2015	<b>BF Date / Date rappel:</b>	<b>Ret. Date / Date de retour:</b>
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**Synopsis / Précis:** (INCOMING) LETTER TO THE MINISTER OF JUSTICE FROM INFORMATION COMMISSIONER OF CANADA REQUESTING ACCESS TO INFORMATION ACT REFORM

REQUEST BRIEFING NOTE	[ ]	DEMANDER NOTE DE SYNTHÈSE
YOUR RECOMMENDATION	[ ]	VOTRE RECOMMANDATION
ACTION AT YOUR DISCRETION	[ ]	DONNER SUITE À VOTRE DISCRÉTION
DRAFT RESPONSE FOR DM SIGNATURE	[ ]	FAIRE UN PROJET DE RÉPONSE POUR LA SIGNATURE DU SM
ACTION	[ ]	ACTION
DIRECT REPLY WITH COPY TO DMO	[ ]	POUR RÉPONSE ET COPIE AU BSM
FOR REVISION (UPDATE)	[ ]	POUR RÉVISION (METTRE À JOUR)
TO ATTEND IF INTERESTED (PLEASE INFORM DMO OF DECISION)	[ ]	PARTICIPATION SI VOUS ÊTES INTÉRESSÉ (S.V.P. AVISEZ LE BSM DE LA DÉCISION)
FOR CORRECTIONS	[ ]	POUR CORRECTIONS
FOR INFORMATION	[ ]	POUR INFORMATION

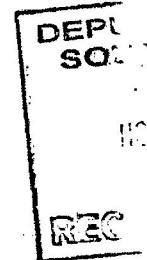
**Additional Comments / Remarques additionnelles:**

CC:  
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Commissaire  
à l'information  
du Canada      Information  
Commissioner  
of Canada  
  
Gatineau, Canada  
K1A 1H3



NOV 2 3 2015

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice and  
Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

Dear Minister:

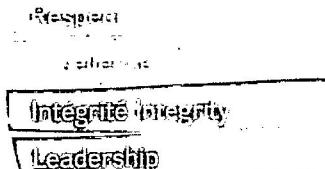
I would like to congratulate you on your appointment to the position of Minister of Justice and Attorney General of Canada.

I am pleased that the current government views the need for greater accountability and transparency as a priority. I believe that Canadians are demanding and expecting a well-functioning access to information system that is fully integrated in the government's vision for open government.

Unfortunately, Canadians have seen their rights erode as a result of an outdated *Access to Information Act* (Act) which is in immediate need of reform. I have tabled last March 2015 a report to Parliament that makes 85 recommendations to modernize the Act. Please find a copy of the report enclosed.

The erosion is also the result of the adoption of amendments to existing laws or new legislation that have limited the application of the Act. Of great significance recently was the adoption of Bill C-59, the *Economic Action Plan 2015 Act, No. 1* which has amended the *Ending the Long-gun Registry Act*. These amendments retroactively oust the application of the *Access to Information Act*. In my view, these amendments are unconstitutional and contravene the rule of law. The matter is currently before the Superior Court of Ontario.

I am also pleased to see that some of the key priorities in your mandate letter relate to enhancing the openness of government, reviewing the *Access to Information Act* and ending ongoing litigation that is not consistent with your government's commitments or the Charter. All these priorities will serve to strengthen the access to information system.



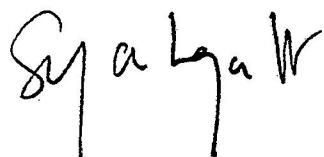
Page 2

UNESCO just designated September 28 as the "International Day for the Universal Access to Information" and chose access to information as the theme for the World Press Freedom Day events in 2016. Next year will also mark the 250<sup>th</sup> anniversary of Sweden's *Freedom of the Press Act*. This act is considered to be the first freedom of information legislation in the world. Events will take place all around the world, including here in Ottawa. They represent a unique opportunity to celebrate access to information rights in Canada. It is my sincere hope that my office and your department can collaborate to celebrate these events together.

I believe that a strong commitment at the highest echelon of government for the principles embedded in the *Access to Information Act*, including collaboration with my Office, will contribute significantly towards greater transparency and accountability.

I would welcome a meeting with you to discuss the current challenges posed by the Act and how my office and I can collaborate with your department to move forward on a renewed and efficient commitment to Canada's access to information system.

Sincerely,



Suzanne Legault  
Information Commissioner of Canada

c.c.: William F. Pentney  
Deputy Minister of Justice

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**Page 489**  
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**23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

**Pages 490 to / à 491  
are not relevant  
sont non pertinentes**

**Pages 492 to / à 543  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

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**69(1)(d), 69(1)(g) re (a)**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**

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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**



## Fiche d'approbation Approval Slip

*À remplir par le secteur / To be completed by sector*

**DOSSIER/FILE # 2016-006618**

**Objet / Subject**

BB

**Prepared by:** Robert Abramowitz and  
Anna Piekarzewski

**Cote de sécurité Security level:** Solicitor-  
Client

**Personnel de soutien /**  
**Administrative personnel:** Alannah Ward

s.23

**Numéro de téléphone /**  
**Telephone number:** 613-952-4765

**Nombre de pièces jointes /**  
**Number of attachments:** 4

**Date limite à l'ULM /**  
**Due at MLU:** April 14, 2016

**Soumise pour approbation à**  
**Sector approvals as required**

Initiales	Année	Mois	Journée
Initials	Year	Month	Day

Elisabeth Eid, ADM, PSDI Portfolio

22 2016 04 14

Équipe du SM / DM-Team

**Approbation/signature/examen du ministre demandé pour le :**  
**Minister's signature/approval/review requested by:** \_\_\_\_\_

**Remarques / remarks:**

*À remplir par l'ULM / To be completed by MLU*  
*À la demande de /Requested by:/ Veuillez faire*  
*parvenir à :/Please forward to:*

**Revue interne / Seen by:** \_\_\_\_\_  
**Rédaction par/ Edited by:** \_\_\_\_\_

**Reçue / received:** \_\_\_\_\_

**Received in MLU:** \_\_\_\_\_



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

s.23

**NUMERO DU DOSSIER/FILE #: 2016-006618**  
**COTE DE SECURITE/SECURITY CLASSIFICATION: Protected B**

**TITRE/TITLE:** [Redacted]

**SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY**



Approbation/signature du ministre demandée pour le/Minister's signature/approval requested by:  
\_\_\_\_\_  
[Redacted]

Soumis par (secteur)/Submitted by (Sector): \_\_\_\_\_

Responsable dans l'équipe du SM/Lead in the DM Team: \_\_\_\_\_

Revue dans l'ULM par/Edited in the MLU by: \_\_\_\_\_

Soumis au CM/Submitted to MO:



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)  
s.21(1)(b)  
s.23

Protected B: solicitor-client privilege  
FOR INFORMATION

2016-006618

## MEMORANDUM FOR THE MINISTER

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**Page 550**  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**



**ANNEXES:**

Annex 1:

Annex 2:

Annex 3:

Annex 4:

**PREPARED BY**

Robert Abramowitz and Anna Piekarzewski

Counsel

Public Safety, Defence and Immigration Portfolio

613-990-6110, 613-949-2752

s.21(1)(a)

s.21(1)(b)

s.23

**Pages 552 to / à 553  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 554 to / à 557**

**are not relevant**

**sont non pertinentes**



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(b)  
s.23

Protected B: Solicitor-Client Privilege  
FOR INFORMATION

2016-???

## MEMORANDUM FOR THE MINISTER

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Page 1 of 1  
File name

**Page 559**  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act**  
**de la Loi sur l'accès à l'information**



**ANNEXES:**

Annex 1:

Annex 2:

Annex 3:

Annex 4: (add)

s.21(1)(a)

s.21(1)(b)

s.23

**PREPARED BY**

Robert Abramowitz and Anna Piekarzewski  
Counsel  
Public Safety, Defence and Immigration Portfolio  
613-990-6110, 613-949-2752

**Pages 561 to / à 578  
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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

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**23**

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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

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**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

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**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 633 to / à 638  
are not relevant  
sont non pertinentes**

Court file No.: 15-64739

**SUPERIOR COURT OF JUSTICE**  
*(East Region – Ottawa)*

**CASE CONFERENCE FORM**

**Short Title:** Information Commissioner of Canada et al. v. Attorney General of Canada

**REQUESTED BY:** Attorney General of Canada (on consent)

**Nature of Action:**  Ordinary Civil Proceeding  Rule 76  Construction Lien  
 Application  Class Action  Mortgage

**Phone #:**613-670-6288      **Fax #:**613-954-1920      **Email:**robert.mackinnon@justice.gc.ca;  
gregory.tzemenakis@justice.gc.ca

**Case Conference Requested** • appearance • phone  
 in writing (consent only)  express (appear on running list)

**This request is on consent of all parties:**  Yes (*attach consent*)  No

**Related Files:** Federal Court File T-785-15

**Status of Case:** Active

**Purpose of the Case Conference:**

<input checked="" type="checkbox"/> Create/amend a timetable for the proceeding	<input type="checkbox"/> Explore methods to resolve contested issues
<input type="checkbox"/> Discovery planning	<input type="checkbox"/> Mediation issues
<input type="checkbox"/> Directions under s. 67, Construction Lien Act	<input type="checkbox"/> Requires active case management under Rule 77
<input type="checkbox"/> Set trial date, pre-trial date and timelines	<input type="checkbox"/> Other procedural matter:

**DISPOSITION BY JUDGE/CASE MANAGEMENT MASTER**

- Case Conference to be held on the following date and time \_\_\_\_\_.
- This request requires a motion on notice to all parties.
- Other:

On the consent of the parties, the timetable for the next steps in this litigation is suspended pending settlement negotiations. This matter may be brought back by the Applicants upon 7 days notice to the Attorney General for a case conference with the case management judge to amend the timetable. The existing trial dates are not vacated for the moment in the event this matter is re-instated in a short timeframe and a reasonable timetable can be agreed upon with the same trial dates.

Date: March 9th 2016

Hall G.J.

Judge/Master



Department of Justice  
Canada

Ministère de la Justice  
Canada

NUMÉRO DU DOSSIER/FILE #: 2015-014129  
COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Protected B

**TITRE/TITLE: Request to Meet from the Information Commissioner of Canada**

**SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY**

- On November 23, 2015, the Information Commissioner wrote to you (Annex 1) to express interest in meeting to discuss modernization of the *Access to Information Act* (ATIA) and her constitutional challenge to the recent amendments to the *Ending the Long-gun Registry Act* (ELRA).
- The Information Commissioner tabled her 2014-2015 Annual Report in Parliament on December 8, 2015.
- You will be working with the President of the Treasury Board to support his review of the ATIA.
- The Minister of Public Safety is leading the Government's response to the Information Commissioner's constitutional challenge to recent amendments to the ERLA.
- A meeting with the Information Commissioner is recommended as it would promote collaboration between the Department of Justice and the Information Commissioner, a key stakeholder in access to information reform initiatives. As the matter is currently before the court, we would recommend not discussing the Commissioner's constitutional challenge to the *Ending the Long-gun Registry Act* at this time.
- A draft response letter welcoming the proposed meeting is attached at Annex 5.

Approbation/signature du ministre demandée pour le/Minister's signature/approval requested by:

January 22, 2015

Soumis par (secteur)/Submitted by (Sector): Public Law Sector

Responsable dans l'équipe du SM/Lead in the DM Team: Sarah Geh

Revue dans l'ULM par/Edited in the MLU by: Olivier Cullen

Soumis au CM/Submitted to MO: January 7, 2015



Department of Justice  
Canada

Ministère de la Justice  
Canada

Protected B  
FOR APPROVAL

2015-014129

## MEMORANDUM FOR THE MINISTER

### Request to Meet from the Information Commissioner of Canada, Suzanne Legault

#### ISSUE

This note provides background information on the Information Commissioner's priorities as they relate to the mandate of the Department of Justice. This note also seeks approval of an affirmative response to the Information Commissioner's request to meet to discuss modernization of the *Access to Information Act*.

The meeting request was through a letter to you dated November 23, 2015 (Annex 1).

#### BACKGROUND

The *Access to Information Act* (ATIA) came into force in 1983. Despite significant pressure to modernize the ATIA over the years, the Act has not been substantially amended since its adoption in 1982. The Information Commissioner has identified the challenges posed by digital records, the evolution of the administration of government, and the emergence of the open government movement as key developments necessitating reform of the ATIA.

The Information Commissioner is an independent Agent of Parliament who oversees the application of the ATIA by receiving and investigating complaints related to the federal government's access to information practices. She provides reports with non-binding recommendations to government institutions and, where she finds a denial of access to information, she may initiate proceedings to ask the Federal Court to order the Government to disclose records.

In a Special Report to Parliament tabled March 31, 2015, the Information Commissioner concluded that the ATIA no longer strikes the right balance between the public's right to know and government's need to protect information. She put forward eighty-five recommended amendments. Annex 2 is a list of the recommendations in the report.

As Attorney General, you provide legal advice on the interpretation of the ATIA to most government institutions subject to the Act. The Attorney General also represents these institutions in Court when their decisions are judicially reviewed. You are also specifically designated—by Order-in-Council—as the Minister responsible for particular provisions with respect to the scope and application of the Act. The President of the Treasury Board is responsible for the administration of the Act, including the publication of Guidelines.

On November 23, 2015, the Information Commissioner wrote to you to express her interest in meeting. She would like to discuss reform of the ATIA, her constitutional challenge to recent amendments to the *Ending the Long-gun Registry Act* (ELRA), and how to collaborate with the Department of Justice to renew Canada's access to information system and celebrate upcoming milestones. She also expresses her hope that the Department of Justice will collaborate with her office to celebrate World Press Freedom Day events in 2016 along with the 250<sup>th</sup> anniversary of Sweden's *Freedom of the Press Act*.

### ***Review of the ATIA***

Your mandate letter confirms the Government's commitment to openness and transparency, noting that the government and its information should be open by default. You will be working with the President of the Treasury Board to support the review of the ATIA to ensure that Canadians have easier access to information; that the Information Commissioner is empowered to order government information to be released; and, that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts.

### ***Constitutional challenge to the ELRA***

The ELRA eliminated the requirement to register certain firearms and mandated the destruction of existing records within the Canadian Firearms Registry. The Act came into force in April 2012, after an access request had been made for a copy of the database. In May 2015, the Information Commissioner submitted a Special Report to Parliament finding evidence that the RCMP had destroyed records with the knowledge that these records were subject to the right of access. Your predecessor referred the matter to the Ontario Provincial Police for investigation. Annex 3 is a copy of the Information Commissioner's *Final Report of Facts and Findings and Recommendations*. She also launched a judicial review in Federal Court alleging that the response by Public Safety Canada to the access request was incomplete.

Amendments to the ELRA, adopted in June 2015, retroactively exempted Registry records from the application of the ATIA. This cut short the Federal Court's oversight of the application made by the Commissioner in May 2015 and the related OPP investigation. The Information Commissioner views these amendments as a very significant regression in access to information and a threat to the rule of law and freedom of expression. In June 2015, she applied to the Ontario Superior Court seeking a declaration that these amendments are unconstitutional.

On December 3, 2015, the Attorney General of Canada was granted an order by the Ontario Superior Court allowing it three months to obtain instructions on how to proceed.

### ***Information Commissioner's 2014-2015 Annual Report***

The Information Commissioner tabled her 2014-15 Annual Report in Parliament on December 8, 2015. The report is structured to support the legislative amendments to the ATIA that she recommended in her March 2015 Special Report to Parliament, linking concrete issues from recent complaint investigations with recommended reforms. A summary of the Commissioner's 2014-15 Annual Report and the report itself is included at Annex 4.

## CONSIDERATIONS

### *Review of the ATIA*

Officials will provide further briefings and advice as this initiative moves forward.

### *Constitutional challenge to the ELRA*

The Minister of Public Safety is the lead on the Information Commissioner's constitutional challenge to the recent amendments to the ELRA.

It would be unusual to comment on active litigation, particularly in these circumstances.

s.21(1)(a)  
s.21(1)(b)  
s.23  
s.69(1)(g) re (a)  
s.69(1)(g) re (c)

## RECOMMENDATION

A meeting with the Information Commissioner is recommended as it would further the goal of promoting collaboration between the Department of Justice and the Information Commissioner, a key stakeholder in access to information reform initiatives. A draft response letter welcoming the proposed meeting is appended at Annex 5 along with proposed talking points at Annex 6. Officials do not recommend discussing the Commissioner's constitutional challenge to the amendments to the ELRA at this time.

## ANNEXES

Annex 1: Letter to The Honourable Jody Wilson-Raybould from Suzanne Legault  
Annex 2: List of the Information Commissioner's March 2015 Special Report to Parliament on Modernization of the *Access to Information Act*.  
Annex 3: Copy of the Information Commissioner's *Appendix 1: Final Report of Facts and Findings and Recommendations* summarizing the long-gun registry complaint investigation.  
Annex 4: Information Commissioner's 2014-15 Annual Report.  
Annex 5: Proposed response to incoming letter dated November 23, 2015 from Suzanne Legault, Information Commissioner of Canada.  
Annex 6: Proposed speaking points for meeting requested by Suzanne Legault, Information Commissioner of Canada.

### PREPARED BY

Megan Brady  
Counsel  
Public Law Sector  
613-954-1618

I CONCUR.

I DO NOT CONCUR.

OTHER INSTRUCTIONS:

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The Honourable Jody Wilson-Raybould

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Date



Commissaire  
à l'information  
du Canada

Information  
Commissioner  
of Canada

Gatineau, Canada  
K1A 1H3

NOV 23 2015

The Honourable Jody Wilson-Raybould, P.C., M.P.

Minister of Justice and  
Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8

Dear Minister:

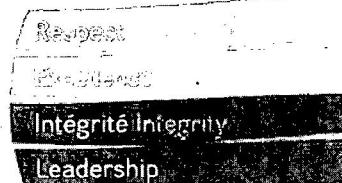
I would like to congratulate you on your appointment to the position of Minister of Justice and Attorney General of Canada.

I am pleased that the current government views the need for greater accountability and transparency as a priority. I believe that Canadians are demanding and expecting a well-functioning access to information system that is fully integrated in the government's vision for open government.

Unfortunately, Canadians have seen their rights erode as a result of an outdated *Access to Information Act* (Act) which is in immediate need of reform. I have tabled last March 2015 a report to Parliament that makes 85 recommendations to modernize the Act. Please find a copy of the report enclosed.

The erosion is also the result of the adoption of amendments to existing laws or new legislation that have limited the application of the Act. Of great significance recently was the adoption of Bill C-59, the *Economic Action Plan 2015 Act, No. 1* which has amended the *Ending the Long-gun Registry Act*. These amendments retroactively oust the application of the *Access to Information Act*. In my view, these amendments are unconstitutional and contravene the rule of law. The matter is currently before the Superior Court of Ontario.

I am also pleased to see that some of the key priorities in your mandate letter relate to enhancing the openness of government, reviewing the *Access to Information Act* and ending ongoing litigation that is not consistent with your government's commitments or the Charter. All these priorities will serve to strengthen the access to information system.



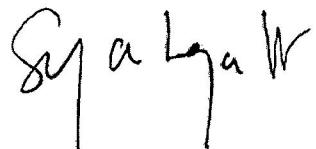
Page 2

UNESCO just designated September 28 as the "International Day for the Universal Access to Information" and chose access to information as the theme for the World Press Freedom Day events in 2016. Next year will also mark the 250<sup>th</sup> anniversary of Sweden's *Freedom of the Press Act*. This act is considered to be the first freedom of information legislation in the world. Events will take place all around the world, including here in Ottawa. They represent a unique opportunity to celebrate access to information rights in Canada. It is my sincere hope that my office and your department can collaborate to celebrate these events together.

I believe that a strong commitment at the highest echelon of government for the principles embedded in the *Access to Information Act*, including collaboration with my Office, will contribute significantly towards greater transparency and accountability.

I would welcome a meeting with you to discuss the current challenges posed by the Act and how my office and I can collaborate with your department to move forward on a renewed and efficient commitment to Canada's access to information system.

Sincerely,



Suzanne Legault  
Information Commissioner of Canada

c.c.: William F. Pentney  
Deputy Minister of Justice



ANNEX 2  
Unclassified  
2015 -014129

**SUMMARY OF THE INFORMATION COMMISSIONER'S MARCH 2015  
SPECIAL REPORT TO PARLIAMENT ON MODERNIZATION OF THE  
*ACCESS TO INFORMATION ACT***

The current Information Commissioner follows her two most recent predecessors in recommending major amendments to the *Access to Information Act* (Act) to expand its application, increase timely disclosure of more information and add to the Commissioner's powers. The report is ambitious: it argues for eighty-five recommended amendments to the Act.

The main recommendations can be summarized as follows:

- Extend the application of the Act to the Prime Minister's Offices, Ministers' Offices, Offices of Secretaries of State, Federal judicial bodies, and Parliamentary bodies;
- Create new limited exemptions for information about parliamentary and judicial functions;
- Create new duties to document government decisions and to report on the loss or unauthorized destruction of information;
- Eliminate all restrictions on who may make access requests and eliminate all fees;
- Decrease ability of government institutions to take extensions and deem third parties to have consented to disclosure of their information if they do not reply within short timelines;
- Bring all currently excluded information within the scope of the Act and instead create new limited exemptions, including for Cabinet confidences and national security information protected under s. 38 of the *Canada Evidence Act*;
- Subject all exemptions in the Act to a "public interest override";
- Reduce the duration of the exemption for solicitor client privileged advice under s. 23 of the Act;
- Reduce the scope and duration of the exemption for advice to Ministers under s. 21;
- Require that government institutions present "access to information impact assessments" to the Commissioner with respect to relevant new or modified programs and activities;
- Create new open government requirements for proactive publication of certain information;
- Consolidate information controls from various statutes into the Act;
- Provide the Commissioner with a ten-year non-renewable term, with the appointment requiring a super-majority of both Chambers of Parliament; and
- Provide the Commissioner with the powers to adjudicate complaints and make binding orders.



Information  
Commissioner  
of Canada

Commissaire  
à l'information  
du Canada

# STRIKING THE RIGHT BALANCE FOR TRANSPARENCY

Recommendations to modernize  
the Access to Information Act

Respect

Excellence

Integrity Intégrité

Leadership

# List of recommendations

## Chapter 1: Extending coverage

### Recommendation 1.1

The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:

- institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);
- institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
- institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);
- institutions established by statute (such as airport authorities); and
- all institutions covered by the *Financial Administration Act*.

### Recommendation 1.2

The Information Commissioner recommends extending coverage of the Act to the Prime Minister's Office, offices of ministers and ministers of State, and parliamentary secretaries.

### Recommendation 1.3

The Information Commissioner recommends creating an exemption in the Act for information related to the parliamentary functions of ministers and ministers of State, and parliamentary secretaries as members of Parliament.

### Recommendation 1.4

The Information Commissioner recommends extending coverage of the Act to the bodies that support Parliament, such as the Board of Internal Economy, the Library of Parliament, the Conflict of Interest and Ethics Commissioner and the Senate Ethics Commissioner.

### Recommendation 1.5

The Information Commissioner recommends creating a provision in the Act to protect against an infringement of parliamentary privilege.

### Recommendation 1.6

The Information Commissioner recommends extending coverage of the Act to the bodies that provide administrative support to the courts, such as the Registry of the Supreme Court, the Courts Administration Service, the Office of the Commissioner for Federal Judicial Affairs and the Canadian Judicial Council.

### **Recommendation 1.7**

The Information Commissioner recommends that the Act exclude records in court files, the records and personal notes of judges, and communications or draft decisions prepared by or for persons acting in a judicial or quasi-judicial capacity.

## **Chapter 2: The right of access**

### **Recommendation 2.1**

The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance.

### **Recommendation 2.2**

The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report.

### **Recommendation 2.3**

The Information Commissioner recommends extending the right of access to all persons.

### **Recommendation 2.4**

The Information Commissioner recommends that institutions be allowed to refuse to process requests that are frivolous, vexatious or an abuse of the right of access.

### **Recommendation 2.5**

The Information Commissioner recommends that institutions' decision to refuse to process an access request be subject to appeal to the Information Commissioner.

### **Recommendation 2.6**

The Information Commissioner recommends limiting the application of section 10(2) to situations in which confirming or denying the existence of a record could reasonably be expected to do the following:

- injure a foreign state or organization's willingness to provide the Government of Canada with information in confidence;
- injure the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities;
- injure law enforcement activities or the conduct of lawful investigations;
- threaten the safety of individuals; or
- disclose personal information, as defined in section 3 of the *Privacy Act*.

### **Recommendation 2.7**

The Information Commissioner recommends that institutions be required to provide information to requesters in an open, reusable, and accessible format by default, unless the following circumstances apply:

- the requester asks otherwise;
- it would cause undue hardship to the institution; or
- it is technologically impossible.

### **Recommendation 2.8**

The Information Commissioner recommends eliminating all fees related to access requests.

## **Chapter 3: Timeliness**

### **Recommendation 3.1**

The Information Commissioner recommends that extensions be limited to the extent strictly necessary, to a maximum of 60 days, and calculated with sufficient rigour, logic and support to meet a reasonableness review.

### **Recommendation 3.2**

The Information Commissioner recommends that extensions longer than 60 days be available with the permission of the Information Commissioner where reasonable or justified in the circumstances and where the requested extension is calculated with sufficient rigour, logic and support to meet a reasonableness review.

### **Recommendation 3.3**

The Information Commissioner recommends allowing institutions, with the Commissioner's permission, to take an extension when they receive multiple requests from one requester within a period of 30 days, and when processing these requests would unreasonably interfere with the operations of the institution.

### **Recommendation 3.4**

The Information Commissioner recommends the Act make explicit that extensions for consultations (as per section 9(1)(b)) may only be taken to consult other government institutions or affected parties, other than third parties who already have consultation rights under section 9(1)(c), and only where it is necessary to process the request.

### **Recommendation 3.5**

The Information Commissioner recommends that, in cases where a consulted party fails to respond to a consultation request, the consulting institution must respond to the request within the time limits in the Act.

### **Recommendation 3.6**

The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

### **Recommendation 3.7**

The Information Commissioner recommends allowing an extension when the requested information is to be made available to the public, rather than claiming an exemption.

### **Recommendation 3.8**

The Information Commissioner recommends that if an extension is taken because the information is to be made available to the public, the institution should be required to disclose the information if it is not published by the time the extension expires.

### **Recommendation 3.9**

The Information Commissioner recommends repealing the exemption for information to be published (section 26).

### **Recommendation 3.10**

The Information Commissioner recommends that extension notices should contain the following information:

- the section being relied on for the extension and the reasons why that section is applicable;
- the length of the extension (regardless of what section the extension was taken under);
- the date upon which the institution will be deemed refusal if it fails to respond;
- a statement that the requester has the right to file a complaint to the Information Commissioner about the extension within 60 days following receipt of the extension notice; and
- a statement that the requester has the right to file a complaint to the Information Commissioner within 60 days of the date of deemed refusal if the institution does not respond to the request by the date of the expiry of the extension.

## **Chapter 4: Maximizing disclosure**

### **Recommendation 4.1**

The Information Commissioner recommends that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider the following, non-exhaustive list of factors:

- open government objectives;
- environmental, health or public safety implications; and
- whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person.

### **Recommendation 4.2**

The Information Commissioner recommends that all exclusions from the Act should be repealed and replaced with exemptions where necessary.

### **Recommendation 4.3**

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information from the provincial, municipal, regional or Aboriginal government to whom the confidential information at issue belongs.

### **Recommendation 4.4**

The Information Commissioner recommends requiring institutions to seek consent to disclose confidential information of the foreign government or international organization of states to which the confidential information at issue belongs, when it is reasonable to do so.

### **Recommendation 4.5**

The Information Commissioner recommends that, where consultation has been undertaken, consent be deemed to have been given if the consulted government does not respond to a request for consent within 60 days.

### **Recommendation 4.6**

The Information Commissioner recommends requiring institutions to disclose information when the originating government consents to disclosure, or where the originating government makes the information publicly available.

### **Recommendation 4.7**

The Information Commissioner recommends replacing international and federal-provincial "affairs" with international and federal-provincial "negotiations" and "relations."

### **Recommendation 4.8**

The Information Commissioner recommends combining the intergovernmental relations exemptions currently found in sections 14 and 15 into a single exemption.

### **Recommendation 4.9**

The Information Commissioner recommends a statutory obligation to declassify information on a routine basis.

### **Recommendation 4.10**

The Information Commissioner recommends repealing the exemption for information certified by the Attorney General (section 69.1).

### **Recommendation 4.11**

The Information Commissioner recommends repealing the exemptions for information obtained or prepared for specified investigative bodies (section 16(1)(a)), information relating to various components of investigations, investigative techniques or plans for specific lawful investigations (section 16(1)(b)) and confidentiality agreements applicable to the RCMP while performing policing services for a province or municipality (section 16(3)).

### **Recommendation 4.12**

The Information Commissioner recommends amending the exemption for personal information to allow disclosure of personal information in circumstances in which there would be no unjustified invasion of privacy.

### **Recommendation 4.13**

The Information Commissioner recommends that the definition of personal information should exclude workplace contact information of non-government employees.

### **Recommendation 4.14**

The Information Commissioner recommends including a provision in the Act that allows institutions to disclose personal information to the spouses or relatives of deceased individuals on compassionate grounds, as long as the disclosure is not an unreasonable invasion of the deceased's privacy.

### **Recommendation 4.15**

The Information Commissioner recommends requiring institutions to seek the consent of the individual to whom the personal information relates, wherever it is reasonable to do so.

### **Recommendation 4.16**

The Information Commissioner recommends requiring institutions to disclose personal information where the individual to whom the information relates has consented to its disclosure.

### **Recommendation 4.17**

The Information Commissioner recommends a mandatory exemption to protect third-party trade secrets or scientific, technical, commercial or financial information, supplied in confidence, when the disclosure could reasonably be expected to:

- significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- result in similar information no longer being supplied voluntarily to the institution when it is in the public interest that this type of information continue to be supplied; or
- result in undue loss or gain to any person, group, committee or financial institution or agency.

### **Recommendation 4.18**

The Information Commissioner recommends requiring institutions to disclose information when the third party consents to disclosure.

### **Recommendation 4.19**

The Information Commissioner recommends that the limited public interest override in the third party exemption be repealed in light of the general public interest override recommended at Recommendation 4.1.

### **Recommendation 4.20**

The Information Commissioner recommends that the third party exemptions may not be applied to information about grants, loans and contributions given by government institutions to third parties.

### **Recommendation 4.21**

The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations.

### **Recommendation 4.22**

The Information Commissioner recommends explicitly removing factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution from the scope of the exemption for advice and recommendations.

### **Recommendation 4.23**

The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.

### **Recommendation 4.24**

The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege.

### **Recommendation 4.25**

The Information Commissioner recommends that the solicitor-client exemption may not be applied to aggregate total amounts of legal fees.

### **Recommendation 4.26**

The Information Commissioner recommends a mandatory exemption for Cabinet confidences when disclosure would reveal the substance of deliberations of Cabinet.

### **Recommendation 4.27**

The Information Commissioner recommends that the exemption for Cabinet confidences should not apply:

- to purely factual or background information;
- to analyses of problems and policy options to Cabinet's consideration;
- to information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act;
- to information in a record that has been in existence for 15 or more years; and
- where consent is obtained to disclose the information.

### **Recommendation 4.28**

The Information Commissioner recommends that investigations of refusals to disclose pursuant to the exemption for Cabinet confidences be delegated to a limited number of designated officers or employees within her office.

### **Recommendation 4.29**

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of all of the provisions listed in Schedule II and any legislation that otherwise limits the right of access. Any provision covered by the general exemptions in the Act should be repealed.

### **Recommendation 4.30**

The Information Commissioner recommends that new exemptions be added to the Act, in consultation with the Information Commissioner, where the information would not be protected by a general exemption that already exists in the Act.

### **Recommendation 4.31**

The Information Commissioner recommends that section 24 and Schedule II be repealed.

### **Recommendation 4.32**

The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of the exemptions and exclusions for institutions brought under the coverage of the Act as a result of the *Federal Accountability Act*.

## **Chapter 5: Strengthening oversight**

### **Recommendation 5.1**

The Information Commissioner recommends strengthening oversight of the right of access by adopting an order-making model.

### **Recommendation 5.2**

The Information Commissioner recommends providing the Information Commissioner with the discretion to adjudicate appeals.

### **Recommendation 5.3**

The Information Commissioner recommends that the Act provide for the explicit authority to resolve appeals by mediation.

### **Recommendation 5.4**

The Information Commissioner recommends that any order of the Information Commissioner can be certified as an order of the Federal Court.

### **Recommendation 5.5**

The Information Commissioner recommends that the Act maintain the existing power to initiate investigations related to information rights.

### **Recommendation 5.6**

The Information Commissioner recommends that the Act provide for the power to audit institutions' compliance with the Act.

### **Recommendation 5.7**

The Information Commissioner recommends that the Act maintain the existing investigative powers of the Information Commissioner.

### **Recommendation 5.8**

The Information Commissioner recommends that the Act provide for the power to carry out education activities.

### **Recommendation 5.9**

The Information Commissioner recommends that the Act provide for the power to conduct or fund research.

### **Recommendation 5.10**

The Information Commissioner recommends that the government be required to consult with the Information Commissioner on all proposed legislation that potentially impacts access to information.

### **Recommendation 5.11**

The Information Commissioner recommends that institutions be required to submit access to information impact assessments to the Information Commissioner, in a manner that is commensurate with the level of risk identified to access to information rights, before establishing any new or substantially modifying any program or activity involving access to information rights.

### **Recommendation 5.12**

The Information Commissioner recommends:

- that the appointment of the Information Commissioner be approved by more than two-thirds of the House of Commons and the Senate;
- 10 years relevant experience in order to be eligible for the position of Information Commissioner; and
- a non-renewable, 10-year term for the position of Information Commissioner.

## **Chapter 6: Open information**

### **Recommendation 6.1**

The Information Commissioner recommends that institutions be required to proactively publish information that is clearly of public interest.

### **Recommendation 6.2**

The Information Commissioner recommends requiring institutions to adopt publication schemes in line with the *Directive on Open Government*.

### **Recommendation 6.3**

The Information Commissioner recommends including within publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.

### **Recommendation 6.4**

The Information Commissioner recommends including within publication schemes a requirement that institutions post the responsive records of completed access to information requests within 30 days after the end of each month, if information is or is likely to be frequently requested.

### **Recommendation 6.5**

The Information Commissioner recommends a discretionary exemption that would allow institutions to refuse to disclose information that is reasonably available to the requester. The exemption should continue to allow an institution to withhold information placed in Library and Archives Canada or listed museums by third parties.

## Chapter 7: Consequences for non-compliance

### **Recommendation 7.1**

The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.

### **Recommendation 7.2**

The Information Commissioner recommends that section 67.1 prohibit destroying, mutilating, altering, falsifying or concealing a record or part thereof or directing, proposing or causing anyone to do those actions.

### **Recommendation 7.3**

The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.

### **Recommendation 7.4**

The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.

### **Recommendation 7.5**

The Information Commissioner recommends that no one acting reasonably and in good faith in the performance of their duties under the Act will be subject to sanction.

### **Recommendation 7.6**

The Information Commissioner recommends increasing the maximum fine for summary convictions under the Act to \$5,000 and to \$25,000 for indictable offences.

### **Recommendation 7.7**

The Information Commissioner recommends an administrative monetary regime be added to the Act, which should include a requirement to publish any administrative monetary penalty imposed.

### **Recommendation 7.8**

The Information Commissioner recommends that adherence to the requirements of the *Access to Information Act* be made a term and condition of employment for employees, directors and officers of institutions.

### **Recommendation 7.9**

The Information Commissioner recommends that an investigation under the Act must be suspended when the Information Commissioner believes on reasonable grounds that a criminal offence on the same subject-matter of the investigation has occurred.

### **Recommendation 7.10**

The Information Commissioner recommends that the Information Commissioner be permitted to share any information to the appropriate authority where the Information Commissioner believes a referral is warranted about anyone's conduct related to a criminal offence.

## Chapter 8: Mandatory period review of the Act

### **Recommendation 8.1**

The Information Commissioner recommends a mandatory parliamentary review of the Act every five years, with a report tabled in Parliament.

## Office of the Information Commissioner of Canada

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### Appendix 1: Final Report of Facts and Findings and Recommendations

On March 27, 2012, the complainant made the following request for records to the RCMP under the *Access to Information Act* (the Act):

An electronic copy of: a) all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and are under the control of the Commissioner of Firearms; and b) all records related to the registration of firearms that are neither prohibited firearms nor restricted firearms that are under the control of each chief firearms officer. [translated]

As the complainant pointed out to the Office of the Information Commissioner (OIC), the language of the request mirrors the language of section 29 of the *Ending the Long-gun Registry Act* (ELRA) which came into force on April 5, 2012.

On April 13, 2012, the Information Commissioner of Canada (the Information Commissioner) wrote to the Minister of Public Safety and Emergency Preparedness (the Minister) and stated:

[A]ny records under the control of the Commissioner of Firearms and/or the Canadian Firearms Program, for which a request has been received under the Act before the coming into force of subsection 29(1) of the new Act are subject to the right of access and cannot be destroyed until a response has been provided under the Act and any related investigation and court proceedings are completed.

On May 2, 2012, the Minister responded to the Information Commissioner, and copied the Director of Access to Information and Privacy, RCMP, and stated:

With respect to your question on destruction of records in the CFIS, please be assured that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

On July 25, 2012, the Information Commissioner received the complaint concerning the fees applied to the processing of the request. The RCMP had notified the complainant 10 days earlier that a fee estimate of \$1150 was applicable for the processing of the request. The RCMP also indicated that it would only process the request if the complainant agreed to pay the applicable fees. The complaint was settled after the complainant clarified the request to: "I would like to have access to the Firearms Registry database." [translated] The RCMP agreed not to charge fees.

Between October 25 and October 29, 2012, the RCMP destroyed all electronic records of non-restricted firearms, with the exception of those belonging to Quebec residents.

On January 11, 2013, the RCMP responded to the complainant and provided 16 columns of information and 8,016,810 rows of records.

### The Investigation

On February 1, 2013, the OIC received the complainant's complaint alleging that additional records should exist following the response provided by the RCMP on January 11, 2013. Specifically the complainant made three allegations which are dealt with in this report:

1. That the information provided is incomplete (missing both columns and registrations);
2. That the RCMP did not justify the incomplete response;
3. That by destroying the responsive records, the RCMP obstructed the complainant's right of access, pursuant to section 67.1 of the Act.

In investigating these issues, the OIC received numerous documents, sought and obtained the representations of the complainant and those of the RCMP. The OIC visited the office of the Canadian Firearms Program (CFP) and viewed the Canadian Firearm Information System (CFIS) in its production environment. The OIC examined individuals from the RCMP involved in the destruction of the records relating to the registration of non-restricted firearms. The examinations were conducted under oath and transcribed by a court reporter. In addition, all persons examined were represented by counsel.

#### ***Incomplete response***

Upon examination of the request, and the clarification of October 25, 2012, it is the Information Commissioner's view that the request sought all information pertaining to the registration of non-restricted firearms in the CFIS.

The RCMP's response of January 11, 2013, was a copy of the records provided in a response to another previous request. A review of the information provided by the RCMP in the response to the complainant shows that the RCMP released the following columns of information: Make, Model, Manufacturer, Type, Action, Class, Barrel Length, Calibre, Shots, Registration Date, Province, Postal Code, Client Type, Firearm Stolen Date, Firearm Loss Date, and Recovered Date.

During the course of the Information Commissioner's investigation, she reviewed the information required to register a firearm as well as a copy of a Firearm Registration Certificate. Upon review of these documents, it is clear that the complainant did not receive the columns identifying the: Serial Number, Firearm Identification Number, and the Registration Certificate Number. These columns are used to assist the RCMP to identify owners of long-guns in the CFIS and therefore relate to the registration of non-restricted firearms.

The Information Commissioner's investigation also determined a total of 64 columns of records are responsive to the request.

Furthermore, based on the testimony provided by the witnesses interviewed and the on-site visit by investigators from the OIC to view the CFIS database, the Information Commissioner determined that scanned images of all registration and transfer applications received by the CFP were accessible through the CFIS. The Information Commissioner is of the view that these images of the registration and transfer applications are related to the registration of non-restricted firearms, are available electronically in the CFIS, and are, therefore, also responsive to the request.

Consequently, the Information Commissioner is of the view that the RCMP's response to the access request was incomplete.

#### ***The RCMP did not justify the incomplete response***

The RCMP is of the view that they have provided the complainant with a complete response. Consequently, the RCMP did not provide a justification.

***The RCMP obstructed the complainant's right of access pursuant to section 67.1 of the Act***

In conducting an investigation, subsection 63(2) of the Act gives the Information Commissioner discretion to disclose information to the Attorney General where she is of the opinion that there is evidence of the possible commission of an offence.

Subsection 63(2) of the *Access to Information Act*, states:

The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

The information and evidence obtained during the Information Commissioner's investigation has led her to conclude that the RCMP destroyed records responsive to the request with the knowledge that these records were subject to the right of access guaranteed by subsection 4(1) of the Act. In particular, the following factual information relates to the elements of the offence set out in paragraph 67.1(1)(a):

- the RCMP destroyed records contained in the CFIS database that related to the access to information request made on March 27, 2012; the request was made prior to the coming into force of the ELRA;
- the RCMP destroyed these records with the knowledge that they related to the outstanding access request as well as an ongoing investigation;
- the RCMP destroyed these records despite the Information Commissioner's letter, dated April 13, 2012, to the Minister of Public Safety, copying the Commissioner of the RCMP, which clearly stated that these records are subject to the right of access guaranteed by the ATIA and may not be destroyed until a response has been provided to the complainant and any related investigation and court proceedings are completed; and
- as the Information Commissioner has determined in her investigation into the complaint, millions of the records destroyed by the RCMP were responsive to the access request, which remain outstanding.

Based on the information that the OIC has gathered in the context of this investigation the Information Commissioner is of the opinion that there is a possibility that an offense in contravention of section 67.1 of the Act has been committed. On March 26, 2015, the Information Commissioner referred this matter to the Honourable Peter MacKay, P.C., Attorney General of Canada.

## **Recommendations**

On March 26, 2015, the Information Commissioner also wrote to the Minister of Public Safety and Emergency Preparedness pursuant to subsection 37(1) of the Act and reported to him that she found the complaint to be well founded. The Information Commissioner recommended to the Minister that he take the following actions:

- Process the information relating to the registration of non-restricted firearms in the province of Quebec (64 fields identified in the course of her investigation) and include this information in a new response to the complainant.
- Process all images of the registration and transfer applications that still exist within the CFIS pertaining to non-restricted firearms and include this information in a new response to the complainant; and
- Preserve these records until the conclusion of her investigation and any related proceedings.

The Information Commissioner's first recommendation was made on the basis that the RCMP, at the time of her March 26, 2015, letter was still in possession of those records pertaining to Quebec residents. The Information Commissioner had also obtained assurances from the RCMP that they would retain a backup copy of the records should the Supreme Court of Canada's decision, *Quebec (Attorney General) v. Canada (Attorney General)*, result in the destruction.

It would appear that on the weekend of April 10 to 13, 2015, after the recent decision of the Supreme Court of Canada, that the RCMP has destroyed its live database of records relating to non-restricted firearms for Quebec residents.

On April 30, 2014, the Minister informed the Information Commissioner that pursuant to the representations already made to her by the RCMP, the Minister is of the view that the complainant has already received the responsive records that were requested. Therefore, the Minister informed the Information Commissioner that he has no intention of pursuing her first two recommendations.

With respect to the third recommendation, the Minister acknowledged that the RCMP had already provided the Information Commissioner with assurances that a backup copy of the records would not be destroyed.

Based on the foregoing, the Information Commissioner has recorded the complaint as well-founded, with recommendations made to the head of the institution, not resolved.

## Recent Events

On May 7, 2015, the Information Commissioner became aware of provisions in the *Economic Action Plan 2015 Act, No. 1* (Bill C-59) that propose amending the *Ending the Long-gun Registry Act* (ELRA) to prevent the application of the *Access to Information Act*. These provisions apply retroactively to the date the ELRA was introduced in Parliament, which was October 25, 2011.

Bill C-59 states that, retroactive to October 25, 2011, the *Access to Information Act* (the Act) does not apply to any records and copies of the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms. Bill C-59 further specifies that any ongoing action (request, complaint, investigation, application, judicial review, appeal) or other proceeding under the Act since October 25, 2011 must be determined in accordance with the section of the Bill that provides that the Act does not apply.

The Bill also provides that the ELRA prevails over any other Act of Parliament in case of inconsistencies and that the destruction of the records shall take place despite any requirements to retain the records or copies. Finally, Bill C-59 absolves the Crown of any liability for the destruction or any act or omission done during this period in purported compliance with the Act.

## Next Steps

In accordance with subsection 37(5) of the Act, upon receiving this report the complainant has the right to apply to the Federal Court, pursuant to section 41 of the Act, for a review of the decision of the Minister of Public Safety and Emergency Preparedness to refuse to disclose portions of the record at issue.

In addition, paragraph 42(1)(a) authorizes the Information Commissioner to apply to the Court for a review of a refusal to disclose a record with the consent of the complainant. In the present instance, the Information Commissioner was prepared, pursuant to this provision and with the consent of the complainant, to bring an application for judicial review of the refusal by the Minister of Public Safety and Emergency Preparedness to disclose parts of the record at issue.

On May 13, 2015, the complainant provided the Information Commissioner with his consent for the introduction of an application for review. Such consent does not preclude the complainant from appearing as a party in the application initiated by the Information Commissioner pursuant to subsection 42(2) of the Act.

The Information Commissioner will file an application to the Federal Court pursuant to section 42 of the Act.

## Timeline of Events

**On March 27, 2012,** the RCMP received the complainant's request for records under the Act:

An electronic copy of: a) all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and are under the control of the Commissioner of Firearms; and b) all records related to the registration of firearms that are neither prohibited firearms nor restricted firearms that are under the control of each chief firearms officer. [translated]

**On April 5, 2012,** the ELRA received royal assent.

**On April 13, 2012,** the Information Commissioner wrote to the Minister of Public Safety and Emergency Preparedness and stated:

[A]ny records under the control of the Commissioner of Firearms and/or the Canadian Firearms Program, for which a request has been received under the Act before the coming into force of subsection 29(1) of the new Act are subject to the right of access and cannot be destroyed until a response has been provided under the Act and any related investigation and court proceedings are completed.

**On May 2, 2012,** the Minister responded to the Information Commissioner, and copied the Director of Access to Information and Privacy, RCMP, and stated:

With respect to your question on destruction of records in the CFIS, please be assured that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

**On July 5, 2012,** the RCMP notified the complainant that, pursuant to subsection 11(2) of the Act, a total of \$1150 in fees applied to the processing of the request. The RCMP indicated that it would process the request if the complainant agreed to pay the applicable fees.

**On July 25, 2012,** the complainant complained to the Office of the Information Commissioner (OIC) concerning the fees applied to the processing of his request by the RCMP.

**On October 25, 2012,** an investigator from the OIC wrote to the RCMP Access to Information and Privacy (ATIP) Branch to advise that the complainant had clarified the request to seek electronic records contained in the CFIS pertaining to the registration of non-restricted firearms. The investigator also sought representations from the RCMP. The clarified wording of the request reads as follows:

I would like to have access to the Firearms Registry database. [translated]

**Between October 25 and October 29, 2012,** the RCMP destroyed its live database of non-restricted firearm records, with the exception of those belonging to Quebec residents.

**On November 1, 2012**, the media reported that the RCMP confirmed that it had destroyed all electronic records of non-restricted firearm registrations in the CFIS, excluding Quebec.

**On December 17, 2012**, the Information Commissioner wrote to the Minister and asked:

[W]hether in fact the government has destroyed records that were under the control of the RCMP as of the date of the request, namely March 27, 2012, or whether an integral copy of the long-gun registry has been preserved in order to protect the requester's right of access under subsection 4(1) of the Act.

**On January 11, 2013**, the RCMP responded to the complainant and provided 16 columns of information (Make, Model, Manufacturer, Type, Action, Class, Barrel Length, Calibre, Shots, Registration Date, Province, Postal Code, Client Type, Firearm Stolen Date, Firearm Loss Date, and Recovered Date) and 8,016,810 rows of records.

**In January 2013**, the RCMP published the "Audit of the Destruction of Electronic Records Pertaining to the Transitional Provisions in the *Ending the Long-gun Registry Act*".

**On February 1, 2013**, the complainant complained to the OIC alleging that additional records should exist following the response provided by the RCMP on January 11, 2013.

**On February 5, 2013**, in response to the Information Commissioner's letter of December 17, 2012, the Minister informed her that:

With respect to your question on destruction of records in the CFIS, I am assured by the RCMP Commissioner that the RCMP will abide by the right of access described in section 4 of the Act and its obligations in that regard.

**On February 14, 2013**, the OIC reported that all parties agreed to consider the fee complaint as settled.

**On February 22, 2013**, the RCMP was notified that the OIC had received and registered the February 1, 2013, complaint alleging that the RCMP had failed to provide all records responsive to the request made under the Act.

**On February 22, 2013**, the OIC requested that the RCMP provide all records related to this complaint.

**On April 19, 2013**, investigators from the OIC met with officials from the RCMP. During this meeting, the RCMP provided an overview of the CFIS.

**On April 22, 2013**, the RCMP provided the OIC with a copy of the administrative file associated with the request, including all emails and notes.

**On June 18, 2013**, the OIC requested that the RCMP provide it with copies of emails concerning the processing of the request between September 1, 2012 and June 18, 2013, in the email accounts of specific RCMP employees.

**On July 2, 2013**, the RCMP provided the OIC with an electronic copy of the records requested on June 18, 2013.

**On July 8, 2014**, the Information Commissioner issued an order for the production of records pursuant to paragraph 36(1)(a) of the Act and a further production order on July 28, 2014. The RCMP completed its response to these production orders on October 31, 2014.

**On December 18, 2014**, investigators from the OIC interviewed two RCMP employees with direct knowledge of the CFIS through their responsibilities for conducting the audit and implementation of the destruction of the electronic records pertaining to the long-gun registry and who were present during the deletion of data from the CFIS that took place between October 25 and 29, 2012.

**On December 29, 2014**, these same investigators visited the Canadian Firearms Program (CFP), viewed the CFIS in its production environment and recorded several screen shots of the current state of the CFIS.

**On January 19, 2015**, the Information Commissioner wrote to the Commissioner of the RCMP to provide him with an opportunity, pursuant to paragraph 35(2)(b) of the Act, to make representations with respect to Information Commissioner's preliminary findings. The Information Commissioner also requested assurances from Commissioner Paulson that the RCMP would take steps to ensure that the records the Information Commissioner had identified as being responsive to the request would be preserved.

By email dated **February 3, 2015**, counsel for the RCMP provided the Information Commissioner with assurances on behalf of Commissioner Paulson that the RCMP would preserve the records identified by the Information Commissioner as being responsive to the request.

**On February 20, 2015**, the office of the Chief Strategic Policy and Planning Officer provided representations on behalf of the RCMP.

**On March 26, 2015**, the Information Commissioner wrote to the Minister pursuant to subsection 37(1) of the Act to report the results of the Information Commissioner's investigation of the complaint and to make recommendations to him as the head of the RCMP for the purposes of the Act. The Information Commissioner requested that the Minister inform her by April 10, 2015, as to whether he intended to implement her recommendations.

**On March 26, 2015**, pursuant to subsection 63(2) of the Act, the Information Commissioner referred, to the Attorney General of Canada, evidence of the possible commission of an offence in relation to the processing of the request listed at section 67.1 of the Act. The Information Commissioner notified the Minister and the Commissioner of the RCMP that the referral had been made.

**On April 2, 2015**, the Minister requested an extension of 20 days, until April 30, 2015, to respond to Information Commissioner's letter of March 26, 2015. On the same day the Information Commissioner granted the extension on the understanding that a response would be received no later than April 30, 2015.

**On April 30, 2015**, the Minister informed the Information Commissioner that, pursuant to the representations already made to her by the RCMP, the Minister is of the view that the complainant has already received the responsive records that were requested. Therefore, the Minister informed the Information Commissioner that he has no intention of pursuing the first two recommendations. The Minister also acknowledged that the RCMP had already provided the Information Commissioner with assurances that a backup copy of the records would not be destroyed pursuant to the Information Commissioner's third recommendation.

**On May 7, 2015**, the Information Commissioner became aware of provisions in the *Economic Action Plan 2015 Act, No. 1* (Bill C-59) that propose amending the ELRA to prevent the application of the Access to Information Act. These provisions apply retroactively to the date the ELRA was introduced in Parliament (October 25, 2011). Bill C-59 proposes the following amendments:

**230. Subsection 29(3) of the *Ending the Long-gun Registry Act* is replaced by the following:**

Non-application  
— Library and Archives of Canada Act

(3) Sections 12 and 13 of the *Library and Archives of Canada Act* do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

Non-application  
— Access to Information Act

(4) The *Access to Information Act*, including sections 4, 30, 36, 37, 41, 42, 46, 67 and 67.1, does not apply, as of October 25, 2011, with respect to the records and copies referred to in subsections (1) and (2) or with respect to their destruction.

Non-application  
— Privacy Act

(5) The *Privacy Act*, including subsections 6(1) and (3) and sections 12, 29, 34, 35, 41, 42, 45 and 68, does not apply, as of October 25, 2011, with respect to personal information, as defined in section 3 of that Act, that is contained in the records and copies referred to in subsections (1) and (2) or with respect to the disposal of that information.

For greater certainty

(6) For greater certainty, any request, complaint, investigation, application, judicial review, appeal or other proceeding under the *Access to Information Act* or the *Privacy Act* with respect to any act or thing referred to in subsection (4) or (5) that is in existence on or after October 25, 2011 is to be determined in accordance with that subsection.

**230. Le paragraphe 29(3) de la *Loi sur l'abolition du registre des armes d'épaule* est remplacé par ce qui suit :**

(3) Les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

(4) La *Loi sur l'accès à l'information* — notamment les articles 4, 30, 36, 37, 41, 42, 46, 67 et 67.1 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement à leur destruction.

(5) La *Loi sur la protection des renseignements personnels* — notamment les paragraphes 6(1) et (3) et les articles 12, 29, 34, 35, 41, 42, 45 et 68 — ne s'applique pas, à compter du 25 octobre 2011, relativement aux renseignements personnels, au sens de l'article 3 de cette loi, versés dans les registres, fichiers et copies mentionnés aux paragraphes (1) et (2) ni relativement au retrait de ces renseignements.

(6) Il est entendu que toute procédure existante le 25 octobre 2011 ou après cette date — notamment toute demande, plainte, enquête, recours en révision, révision judiciaire ou appel — relative à tout acte ou toute chose mentionnés aux paragraphes (4) ou (5) et découlant de l'application de la *Loi sur l'accès à l'information* ou de la *Loi sur la protection des renseignements personnels* est déterminée en conformité avec l'un ou l'autre de ces paragraphes, selon le cas.

Non-application  
— *Loi sur la Bibliothèque et les Archives du Canada*

Non-application  
— *Loi sur l'accès à l'information*

Non-application  
— *Loi sur la protection des renseignements personnels*

Précision

**230. Subsection 29(3) of the *Ending the Long-gun Registry Act* is replaced by the following:**

Non-application of other federal Acts

(7) In the event of an inconsistency between subsection (1) or (2) and any other Act of Parliament, that subsection prevails to the extent of the inconsistency, and the destruction of the records and copies referred to in that subsection shall take place despite any requirement to retain the records or copies in that other Act.

**231. Section 30 of the Act and the heading before it are replaced by the following:**

No liability — destruction

30. (1) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms or a chief firearms officer, or any person acting on behalf of or under the direction of any of them, with respect to the destruction, on or after April 5, 2012, of the records and copies referred to in subsections 29(1) and (2).

No liability — access to information and privacy

(2) No administrative, civil or criminal proceedings lie against the Crown, a Crown servant, the Commissioner of Firearms, a chief firearms officer, a government institution or the head of a government institution, or any person acting on behalf of or under the

**230. Le paragraphe 29(3) de la *Loi sur l'abolition du registre des armes d'épaule* est remplacé par ce qui suit :**

(7) En cas d'incompatibilité, les paragraphes (1) et (2) l'emportent sur toute autre loi fédérale et la destruction des registres, fichiers et copies qui sont mentionnés à ces paragraphes a lieu malgré toute obligation de conserver ceux-ci en vertu de cette autre loi.

Non-application de toute autre loi fédérale

**231. L'article 30 de la même loi et l'intertitre le précédent sont remplacés par ce qui suit :**

30. (1) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale relativement à la destruction le 5 avril 2012 ou après cette date des registres, fichiers et copies mentionnés aux paragraphes 29(1) et (2).

Immunité : destruction

(2) La Couronne, ses préposés, le commissaire aux armes à feu, les contrôleurs des armes à feu, les institutions fédérales, les responsables d'institution fédérale et les personnes qui agissent pour le compte de l'un ou l'autre d'entre eux ou sous leur autorité bénéficient de l'immunité en matière administrative, civile ou pénale pour tout acte ou omission commis, pendant la période

Immunité : renseignements personnels et accès à l'information

**230. Subsection 29(3) of the *Ending the Long-gun Registry Act* is replaced by the following:**

direction of any of them, for any act or omission done, during the period beginning on October 25, 2011 and ending on the day on which this subsection comes into force, in purported compliance with the *Access to Information Act* or the *Privacy Act* in relation to any of the records and copies referred to in subsections 29(1) and (2).

**230. Le paragraphe 29(3) de la *Loi sur l'abolition du registre des armes d'épaule* est remplacé par ce qui suit :**

commençant le 25 octobre 2011 et se terminant le jour de l'entrée en vigueur du présent paragraphe, en vue de l'observation présumée de la *Loi sur l'accès à l'information* ou de la *Loi sur la protection des renseignements personnels* relativement à tout registre, fichier et copie mentionnés aux paragraphes 29(1) et (2).

**Definitions**

(3) In subsection (2), "government institution" and "head" have the same meanings as in section 3 of the *Access to Information Act* or the same meanings as in section 3 of the *Privacy Act*, as the case may be.

(3) Au paragraphe (2), « institution fédérale » et « responsable d'institution fédérale » s'entendent au sens de l'article 3 de la *Loi sur l'accès à l'information* ou de l'article 3 de la *Loi sur la protection des renseignements personnels*, selon le cas.

**Définitions**

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Date modified: 2014-04-07



ANNEX 4  
Unclassified  
2015-014129

## SUMMARY OF THE INFORMATION COMMISSIONER'S 2014-15 ANNUAL REPORT

In addition to emphasizing high profile issues related to the ending of the long gun registry, the 2014-15 Annual Report highlights as key concerns: delays in providing access to information; broad interpretations of exemptions to the right of access; and, questions about the scope of the application of the Act to records in Ministerial offices, records held by third party contractors and Cabinet confidences.

### **Modernizing the Access to Information Act**

The Information Commissioner's Annual Report reiterates her calls for a comprehensive review and reform of the *Access to Information Act* ("ATIA"). She reproduces many of the recommendations she made in a Special Report to Parliament tabled March 31, 2015, *Striking the Right Balance for Transparency - Recommendations to modernize the Access to Information Act*, linking them with concrete examples of issues identified in recent complaint investigations.

### **Constitutional challenge to the Ending the Long Gun Registry Act ("ELRA")**

The Commissioner emphasizes amendments to the ELRA as the most significant regression in access to information rights in the course of the year. She sees the passage of these amendments as a threat to the rule of law and freedom of expression because they retroactively exempt long-gun registry records from the application of the ATIA. The Information Commissioner has initiated a constitutional challenge to the ELRA and, on December 3, 2015, the court granted the Attorney General of Canada three months to obtain instructions with respect to how to proceed in view of the change of Government.

### **Noteworthy investigations**

The Information Commissioner's Annual Report emphasizes her high profile investigation of the RCMP's refusal to disclose an electronic copy of all 64 columns of records contained in the Canadian Firearms Registry that she considered responsive to a request that preceded the legislated destruction of the records. She found evidence that the RCMP had destroyed records with the knowledge that these records were subject to the right of access. The then Minister of Justice referred the matter to the Ontario Provincial Police for investigation. The Information Commissioner commenced an application in the Federal Court seeking to obtain disclosure of additional records from the Registry. This litigation has been stayed, pending the outcome of her constitutional challenge.

The Privy Council Office's (PCO) treatment of requests for records relating to Senators' expenses are also highlighted in the Commissioner's Annual Report. She outlines a complaint investigation in which she was dissatisfied with PCO's application of exemptions for personal information, solicitor-client privilege and advice, and

recommendations, which resulted in the release of only “meaningless” information. She also highlights investigations into PCO’s failure to ask the Prime Minister’s Office if it possessed records related to certain Senators and PCO’s practice of deleting email accounts of departing employees.

The narrow approach taken by Public Works and Government Services Canada (now Public Services and Procurement) to recognizing control over records held by its third party contractors was investigated and criticized by the Information Commissioner. By contrast, a number of departments’ unduly broad interpretation of a range of exemptions are highlighted.

### **Department of Justice**

Three complaints about the Department of Justice are summarized in the Information Commissioner’s most recent Annual Report. The Information Commissioner concluded that the Department had too broadly applied exemptions for advice and recommendations (s. 21) and solicitor-client privilege (s. 23) and inappropriately refused to confirm or deny the existence of certain records respectively. All three complaint files were resolved to the Commissioner’s satisfaction.

### **Noteworthy judicial proceedings in 2014-15**

Judicial proceedings figure prominently in the Information Commissioner’s assessment of the past year. She highlights two decisions as important advancements: a Federal Court of Appeal decision recognizing the Federal Court’s jurisdiction to review the reasonableness of government institutions’ decisions to take extensions of time to respond to access requests; and a Federal Court decision concluding that the current regulations under the ATIA do not authorize government institutions to charge search and preparation fees for existing electronic records.

### **Cabinet confidences**

Section 69 of the ATIA excludes Cabinet confidences from the application of the ATIA. Historically, an expert group at the Privy Council Office would review records to determine if they contained Cabinet confidences. The responsibility for reviewing records for the inclusion of Cabinet confidences was transferred administratively to the Department of Justice in July 2013. The Information Commissioner has expressed concern about the implications of this change on consistency in the application of s. 69 as well as an apparent increase in its use. The Commissioner is also troubled by the practice of requesters “self-censoring” the information they seek by specifically asking institutions not to process records that might contain Cabinet confidences in order to expedite the processing of their requests. Her Annual Report indicates she is monitoring these issues.

### **The year ahead**

In addition to continuing to advocate for a comprehensive legislative reform of the ATIA, the Information Commissioner will be: pursuing her constitutional challenge to the ELRA; completing an investigation into the impact of federal communications and media relations policies on the public's right of access to timely information from government scientists; piloting a "lean process" for complaint investigations; making recommendations on Canada's Open Government commitments; and implementing a social media strategy to improve stakeholder engagement in relation to access to information rights.

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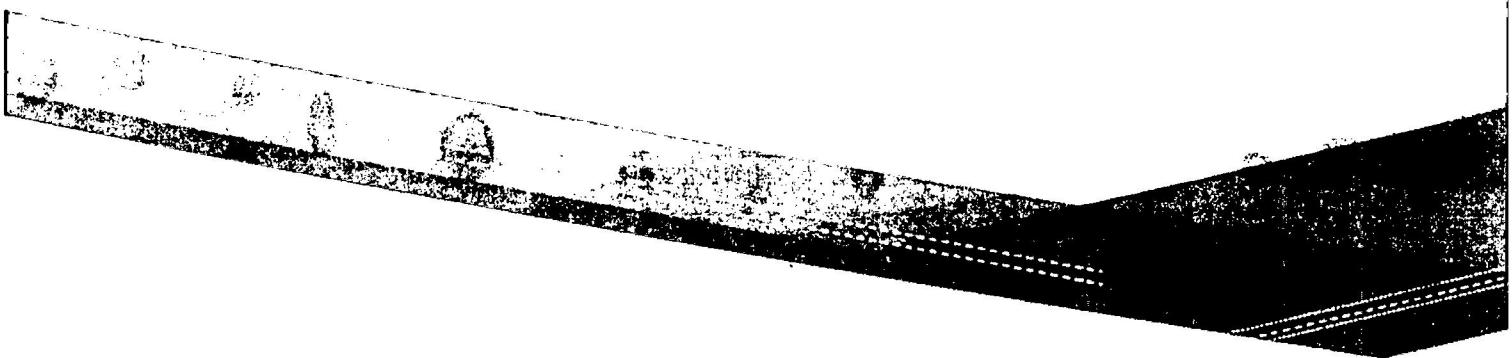
Information  
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à l'information  
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# ANNUAL REPORT

[2014–2015]

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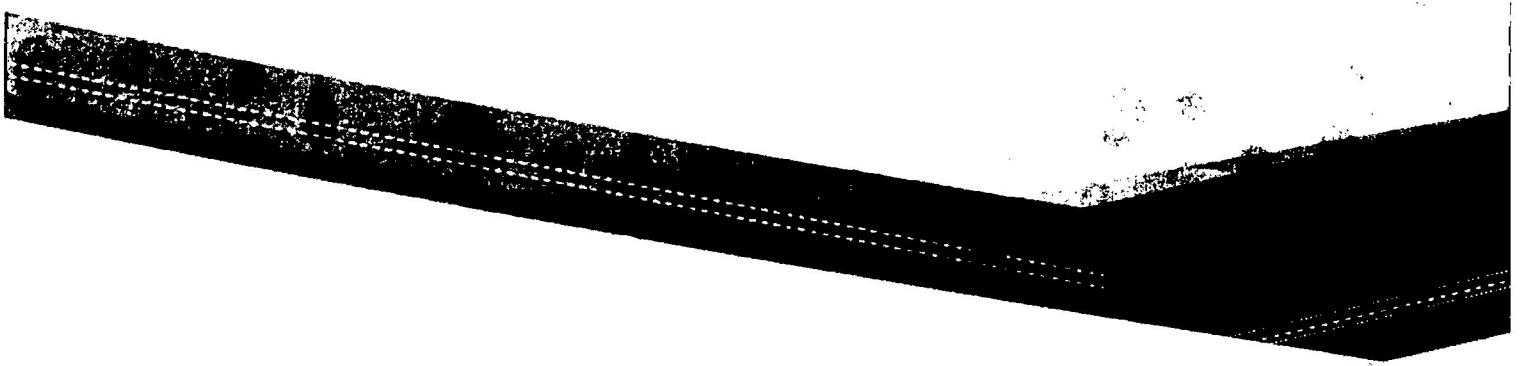
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Cat. No. IP1-2015E-PDF  
ISSN 1497-0600

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# Message from the Commissioner



The year 2014–2015 was probably one of the most challenging of my mandate to date. Significant advances were achieved but equally significant regressions also occurred.

First with the positive.

As Canadians, we continue to benefit every day from the results of access to information requests, as is reported daily in the country's public record, be it in traditional or digital media.

The Federal Court of Appeal brought much-needed discipline to the use of time extensions that institutions can claim before responding to requests. Similarly, the Federal Court clarified that government institutions cannot charge fees to requesters for electronic records.

This year, I tabled a special report in Parliament on modernizing the Act to outline the progressive norms in access to information. This followed my recommendations to the government on its second action plan on open government. Although the government is committed to developing a culture of openness within federal institutions, it, unfortunately, continues to refuse to conduct a comprehensive review of the antiquated *Access to Information Act*. The government still does not see the necessity of adopting an integrated vision to ensure a successful open government initiative and a real change of culture toward openness.

The continued refusal to properly fund the Office of the Information Commissioner has led to an increased backlog of complaints, which can only be described as a concerted effort to deny Canadians' right to timely review of government decisions on disclosure.

The most extraordinary regression of access to information rights, however, resulted from the passage of Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. This new legislation contains retroactive amendments to the *Ending the Long-gun Registry Act* that excludes the application of the

*Access to Information Act* to long-gun registry records. The effects of this Act include nullifying a request for these records and subsequent complaints made to my Office, as well as my entire investigation, recommendations to the Minister of Public Safety, and the requester's ability to seek judicial review from the Federal Court. Essentially, this Act attempts to rewrite history so that the requester's right to seek this information never existed. The Act also retroactively immunizes Crown servants from any finding of administrative, civil or criminal wrongdoing in relation to the request and destruction of the registry records. With the consent of the complainant, I filed an application for judicial review in Federal Court against the Minister of Public Safety and Emergency Preparedness pursuant to section 42 of the *Access to Information Act* in relation to my investigation into an access to information request for the Long-gun Registry. This application has been stayed while the Superior Court of Ontario is considering my application challenging the constitutionality of the *Ending the Long-gun Registry Act* as amended by the passage of Bill C-59.

Throughout this challenging year, the team at the Office of the Information Commissioner came together like never before to support the Commissioner's actions to protect Canadians' quasi-constitutional right of access to government information. They demonstrated resolve, courage, and the highest level of integrity: resolve to continue their important work for Canadians in the face of significant resistance, courage to stand with the Commissioner and demand that the government act at all times in the name of transparency and accountability, and integrity to stand up to attempts to subvert the law of the land and retroactively deny Canadians' right of access. I am profoundly grateful for their support.

## Chapter 1

This annual report sets out the activities of the Information Commissioner of Canada in 2014–2015. This chapter highlights noteworthy examples of the Commissioner's investigations under the *Access to Information Act* and other related activities.

### Access to information: Freedom of expression and the rule of law

In the fall of 2011, the government introduced a law to end the national long-gun registry, the *Ending the Long-gun Registry Act* (ELRA). This law required that all long-gun registry records be destroyed. Although the provisions of ELRA authorizing the destruction of these records specifically excluded the application of the *Library and Archives Act* and the *Privacy Act*, these provisions were silent with respect to the *Access to Information Act*.

In March 2012, an access request was made for the records in the registry. In April 2012, Parliament passed ELRA.

The Commissioner wrote to the Minister of Public Safety in April 2012 informing him that any records under the control of the Royal Canadian Mounted Police (RCMP) for which a request had been received before ELRA came into force were subject to the right of access. The records should therefore not be destroyed until a response had been provided to the requester and any related investigation and court proceedings were completed. The Minister of Public Safety assured the Commissioner that the RCMP would abide by the right of access (<http://bit.ly/1f8Yesv>).

In January 2013, the RCMP responded to the request for the data in the registry. The requester then complained to the Commissioner about this response, alleging, among other things, that the response was incomplete. During her investigation in response to this complaint, the Commissioner learned that the majority of the long-gun registry records had, in fact, been destroyed. (The long-gun registry records relating to Quebec residents were maintained due to ongoing litigation.)

On March 26, 2015, the Commissioner wrote to the Minister to report that she had concluded that the response to the requester was incomplete. She formally recommended to the Minister that the RCMP process those remaining Quebec records she considered to be responsive to the request.

The Minister declined to follow the Commissioner's recommendation to process the Quebec records. He did confirm that the RCMP had preserved a copy of the relevant records (<http://bit.ly/1R9UZSA>).

Based on her investigation, the Commissioner was of the opinion that she had information relating to elements of the criminal offence set out in paragraph 67.1(1)(a) of the Act, which prohibits all persons from destroying records with the intent to deny a right of access. Also on March 26, 2015, the Commissioner referred information collected during this investigation relating to the destruction of the registry records to the Attorney General of Canada for possible investigation.

No response has been received from the Attorney General about this referral. However, media reports indicate that the matter has been referred to the Ontario Provincial Police (Toronto Star, "OPP to investigate allegations of RCMP wrongdoing on gun registry data destruction," <http://on.thestar.com/1HsLOEP>).

In May 2015, the government introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. Included in the bill were retroactive amendments to ELRA. As amended, ELRA would retroactively oust the application of the *Access to Information Act* to long-gun registry records, including the Commissioner's power to make recommendations and report on the findings of investigations relating to these records. ELRA would also oust the right to seek judicial review in Federal Court of government decisions not to disclose these records. In addition, the legislation would retroactively immunize Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

The Commissioner finalized her investigation and tabled a special report of her findings to Parliament in May 2015 while Bill C-59 was still before the House of Commons (<http://bit.ly/1FmLSs5>). She also expressed her serious concerns about the measures in Bill C-59 before both a House of Commons committee (<http://bit.ly/1QJyu1o>) and a Senate committee (<http://bit.ly/1GRMnG2>). (See "On the record," page 47, for an excerpt of her remarks before the Senate committee.)

No changes were made to Bill C-59 as it applied to ELRA after the committees' reviews. The retroactive amendments became law on June 23, 2015.

Following the tabling of her special report, the Commissioner applied, with the consent of the complainant, to the Federal Court for a judicial review of the Minister's refusal to release the records she had determined to be responsive to the request. As part of these proceedings, the Commissioner succeeded in obtaining an order from the Court requiring the Minister of Public Safety to deliver the hard drive containing the long-gun registry records for Quebec to the Federal Court Registry. The Government of Canada complied with this order on June 23, 2015.

On May 7, 2015, Bill C-59, the budget implementation bill, was tabled in Parliament. Division 18 of this bill makes the *Access to Information Act* non-applicable, retroactive to October 25, 2011, the date when the *Ending the Long Registry Act* was first introduced in Parliament. These proposed changes retroactively quash Canadians' rights of access and the government's obligations under the Act. They will effectively erase history.

It is perhaps fitting that this past Monday marked the anniversary of the publication of George Orwell's 1984 and I quote: "Everything faded into mist. The past was erased, the erasure was forgotten, the lie became truth. Every record has been destroyed or falsified...History has stopped. Nothing exists except an endless present in which the Party is always right."

If Bill C-59 passes as is, and it looks like it will, all records related to the destruction of the long gun registry will go through the Memory Holes of the Records Department of the Ministry of Truth."

—Information Commissioner Suzanne Legault,  
speaking at the Access and Privacy Conference, 2015  
in Edmonton, hosted by the University of Alberta's  
Faculty of Extension

The Commissioner also filed before the Ontario Superior Court of Justice an application challenging the constitutionality of ELRA as amended by Bill C-59. The Commissioner's application seeks to invalidate these amendments on the grounds that they unjustifiably infringe the constitutional right of freedom of expression and that they contravene the rule of law by interfering with vested rights of access to this information.

The Commissioner's application to the Federal Court for a judicial review of the Minister's refusal to release the records responsive to the request was stayed in July 2015 pending the outcome of her constitutional challenge.

## Timeline of long-gun registry investigation

October 25, 2011	The <i>Ending the Long-gun Registry Act</i> (ELRA) is introduced in Parliament.
March 27, 2012	Requester makes an access request for records in the registry.
April 5, 2012	ELRA is passed.
April 13, 2012	The Information Commissioner writes to the Minister of Public Safety and Emergency Preparedness.
May 2, 2012	The Minister responds to the Commissioner.
October 25-29, 2012	The RCMP destroys the majority of the long-gun registry records.
January 11, 2013	The RCMP responds to the access request.
February 1, 2013	Requester complains to Commissioner alleging, among other things, that the response was incomplete.
March 26, 2015	The Commissioner reports the results of her investigation, with recommendations to the Minister. That same day, the Commissioner makes a referral to the Attorney General for possible investigation.
April 30, 2015	The Minister responds to the Commissioner's recommendations.
May 7, 2015	The <i>Economic Action Plan 2015 Act, No. 1</i> (Bill C-59) is introduced in Parliament.
May 14, 2015	The Commissioner tables her special report in Parliament. That same day, the Commissioner files her notification of an application to the Federal Court for judicial review.
June 22, 2015	The Commissioner files her application to challenge the constitutionality of ELRA, as amended by Bill C-59. That same day, an order to produce a hard drive containing the remaining long-gun registry records is issued by the Federal Court.
June 23, 2015	The Minister complies with the Federal Court's order. That same day, Bill C-59 is passed.

■ Pre-adoption of ELRA ■ Passage of ELRA ■ ELRA and Access to Information Act in force

## Access to information: Senators' expenses

In 2014–2015, the Commissioner completed three investigations concerning the **Privy Council Office's** (PCO) handling of requests for information related to various senators whose expenses and conduct were reported in the media.

### Disclosing only meaningless information

The first investigation looked at PCO's refusal to release 27 of 28 pages identified in response to a request for "**any records created between March 26, 2013 to present (Monday, August 19, 2013) related to senators Mike Duffy, Mac Harb, Patrick Brazeau and/or Pamela Wallin.**" In particular, the Commissioner examined PCO's use of section 19 (Personal information), section 21 (Advice and recommendations) and section 23 (Solicitor-client privilege) to exempt whole pages of records.

The Commissioner found that portions of the records did not qualify for the claimed exemptions and that PCO also had not reasonably exercised its discretion to release information, bearing in mind relevant factors such as the public interest. She wrote to the Prime Minister (who is the "minister" of PCO) recommending that a significant amount of additional information be released.

PCO, on behalf of the Prime Minister, declined to implement the Commissioner's recommendations, claiming that protection of the information "is appropriate." However, PCO did agree to reassess the records with a view to severing and releasing any information it determined could be disclosed. As a result of this reassessment, small portions of information were released (see box, "Meaningful disclosure?" for a description of what was disclosed). PCO claimed, however, that this release of information was not required under the Act, because the information was "not intelligible, meaningless, or may be misleading."

The information that was severed and released indicates that the records at issue consist of memoranda to the Clerk of the Privy Council, correspondence to and from the Clerk, a memorandum for the Prime Minister, signed and unsigned correspondence, a record of decision, and email exchanges to and from PCO officials. However, the substance of these documents remains protected.

### Meaningful disclosure?

PCO agreed to sever and disclose the following types of information:

- signatures of public servants who had consented to their signatures being disclosed;
- date stamps;
- letterhead elements;
- Government of Canada emblems;
- the words "Dear" and "Sincerely"; and
- Document titles: "Memorandum for the Prime Minister", "Memorandum for Wayne G. Wouters" and "Decision Annex."

However, PCO refused to disclose the substance of the records. The Commissioner will seek the consent of the complainant to apply for a judicial review of PCO's refusal of access.

### Accessing records in the Prime Minister's Office

PCO received a request for all records related to Senator Mike Duffy's and Senator Pamela Wallin's expenses for a particular time period. PCO responded that no such records existed. The requester complained to the Commissioner about this response.

During her investigation, the Commissioner asked PCO to carry out further searches within the institution, with the same result: no responsive records existed.

As a result of media reports outside the context of the Commissioner's investigation, she learned that the email accounts of some departing PMO employees involved in the payment of Senate expenses that she had been told had been deleted had been saved as part of ongoing litigation on another matter (CBC News, "Senate scandal: Benjamin Perrin's PMO emails not deleted," <http://bit.ly/1MaBDs6>). The Commissioner followed up with PCO to determine whether these records were included in its searches. She ascertained that when the request was received, the Prime Minister's Office (PMO) was not asked whether it had any records responsive to the request.

In response to the Commissioner's inquiries, the relevant emails that were subsequently located within the email accounts of the departing PMO employees were disclosed to the Commissioner. Upon review, the Commissioner determined that these emails were not accessible under the Access to Information Act, since the Commissioner determined that these records did not meet the test for control as set out by the Supreme Court of Canada in *Information Commissioner v. Canada (Minister of National Defence) et al.*, 2011 SCC 25 (<http://bit.ly/1fjqb0c>). In this decision, the Court determined that ministers' offices, including the Prime Minister's Office, are not institutions subject to the Act. The Court did acknowledge, however, that some records located in ministers' offices may be subject to the Act. A two-part test was devised for determining whether records physically located in ministers' offices are "under the control" of an institution and therefore accessible under the Act.

This investigation highlights the accountability deficit created by the fact that ministers' offices, including the PMO, are not covered by the Act.

### Extending coverage

In her special report on modernizing the Act, the Commissioner recommended a number of measures to expand the coverage of the Act (<http://bit.ly/1GSi1SJ>):

- establish criteria for determining which institutions would be subject to the Act, such as that all or part of the organization's funding comes from the Government of Canada, that the organization is (in whole or in part) under public control or that it carries out a public function;
- extend coverage to ministers' offices, including the Prime Minister's Office;
- extend coverage to bodies that support Parliament, such as the Board of Internal Economy and the Library of Parliament; and
- extend coverage to bodies that provide administrative support to the courts.

### Assessing information management and recordkeeping policies

Finally, news coverage about the automatic destruction of the email accounts of departing PMO employees, as well as correspondence to the Commissioner on this issue, prompted the Commissioner to initiate an investigation into PCO's and the PMO's information management and recordkeeping policies. Specifically, the Commissioner intended to investigate whether PCO's stated internal practice of deleting email accounts of departing employees resulted in government records of business value being lost, thus preventing PCO from meeting its obligations under the *Access to Information Act*.

The Commissioner found that PCO and the PMO have a comprehensive suite of policies that align with the requirements of the Act, with the *Library and Archives of Canada Act* and with various Treasury Board policies. However, risks with these policies were identified. The main risk related to employees' knowledge of their responsibilities with regard to the retention, deletion, storage and destruction of emails.

During the investigation, PCO reported that it had addressed these risks through its Recordkeeping Transformation Strategy; its Management Action Plan, which it developed after a 2011 horizontal audit of its electronic recordkeeping; and its three-year Risk-Based Audit Plan. The Commissioner reviewed these three documents and concluded that the measures PCO had put in place had mitigated the risks.

The Commissioner did not investigate the implementation of the policies. However, she did inform PCO that it should regularly audit the activities associated with its information management practices in order to meet its obligations under the Act. She also reported to PCO that it should proactively disclose the results of any audits it carries out related to information management.

### Missing records at the Canada Revenue Agency

There have been a number of instances in recent years in which the **Canada Revenue Agency** (CRA) has found additional records during or after the completion of the Commissioner's investigation into missing records complaints.

This issue first came to the forefront after a requester asked CRA for all records relating to the reassessment of her tax return. The requester complained that records were missing from the response she received. During the investigation, CRA informed the Commissioner that the records had been disposed of and could not be retrieved.

After the close of the Commissioner's investigation, the requester sought a judicial review in the Federal Court of CRA's use of exemptions on the records that were released. During these proceedings, CRA retrieved the records it previously said had been disposed of (*Summers v. Minister of National Revenue*, 2014 FC 880; <http://bit.ly/1KiPudD>).

The second instance occurred during judicial review proceedings following the completion of the Commissioner's investigations. The proceedings were initiated by seven numbered companies and were about CRA's refusal to release portions of requested records (3412229 Canada Inc. et al. v. Canada Revenue Agency et al. (T-902-13); background: <http://bit.ly/1Dx7Bx0>; see also "Missing records," page 34). After the commencement of those proceedings, the numbered companies alleged that there were additional records responsive to their requests that ought to have been disclosed. Since that time, CRA has released more than 14,000 additional pages.

The companies subsequently asked that the judicial review proceedings be put on hold until, among other things, the Commissioner investigated the possibility that more records existed. This investigation is ongoing.

In a third instance, the Commissioner investigated the release of 57 pages, with some exemptions, related to the audit of a taxpayer. The requester said that more documents should exist. During the investigation, CRA was asked to conduct additional searches and ensure that all the required offices had been tasked. This resulted in CRA disclosing an additional 57 pages to the requester in four supplementary releases, since records were found in each subsequent search.

Almost half of all CRA missing records complaints closed between April 1, 2012 and March 31, 2015, were well founded (in contrast to the overall average of 27 percent for all institutions for the same period). CRA has acknowledged to the Commissioner that it has a serious information management and document retrieval problem when it comes to identifying and retrieving records in response to access requests. The Commissioner has instituted a certification process to provide

## Missing records certification process with CRA

To ensure that requesters receive all the records to which they are entitled when making access requests to CRA, the Commissioner, in cooperation with CRA, has instituted a certification process.

Prior to the Commissioner closing a missing records complaint against CRA, the Assistant Commissioner or Director General of the identified branch or sector within CRA must certify that all reasonable steps were taken to conduct relevant searches to identify and retrieve responsive documents.

Since implementing this process in March 2015, the Commissioner has received approximately 20 such certifications.

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additional assurances that all records have been properly identified and retrieved (see box, "Missing records certification process with CRA").

## The culture of delay

In March 2015, the Federal Court of Appeal found that a three-year time extension taken by **National Defence** to respond to a request was unreasonable, invalid and constituted a deemed refusal of access. The request was for information about the sale of military assets (*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56; <http://bit.ly/1ICAoIM>; background, "Extensions of time (under appeal)": <http://bit.ly/1IKG477>).

In its decision, the Court of Appeal first addressed whether the Federal Court had jurisdiction to review a decision by a government institution to extend the limit to respond to a request under the Act. The Federal Court had found that it had no such jurisdiction but the Court of Appeal held that the Federal Court did have jurisdiction.

The determination of the jurisdiction issue involved deciding whether a time extension could constitute a refusal of access. Since the Federal Court's jurisdiction is limited to instances of refusals (sections 41 and 42 of

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the *Access to Information Act*), the only route by which to challenge a government institution's time extension is by way of a provision that deems government institutions to have refused access in certain circumstances (section 10(3)).

The Court of Appeal concluded that "a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken."

A reading of the Act that would prevent judicial review of a time extension would, according to the Court of Appeal, fall short of what Parliament intended.

The Court of Appeal found that an institution may avail itself of the power to extend the time to respond to an access request, as provided by section 9 of the Act, but only when all the required conditions of that section are met.

The Court stated that "one such condition is that the period taken be reasonable when regard is had to the circumstances set out in paragraphs 9(1)(a) and/or 9(1)(b). If this condition is not satisfied, the time is not validly extended with the result that the 30-day time limit imposed by operation of section 7 remains the applicable limit."

In its ruling, the Court of Appeal declared that "timely access is a constituent part of the right of access."

In determining that the time extension asserted by National Defence was not valid, the Court found that National Defence's treatment of the extension had fallen short of establishing that a serious effort had been made to assess the duration of the extension. It further noted that National Defence's treatment of the matter had been "perfunctory" and showed that National Defence had "acted as though it was accountable to no one but itself in asserting its extension."

This decision is expected to introduce much-needed discipline into the process of taking and justifying time extensions. It makes clear that extensions are reviewable by the Court and sets out standards to be met to justify the use and length of extensions.

The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision when conducting investigations.

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"...it is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken."

Institutions "must make a **serious effort** to assess the required duration, and ... the estimated calculation [must] be **sufficiently rigorous, logic[al] and supportable** to pass muster under reasonableness review." [emphasis added]

—*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56, paragraphs 76 and 79 (<http://bit.ly/1ICAoIM>)

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## Removing a barrier to access: Fees and electronic records

In February 2013, the Information Commissioner referred a question to the Federal Court to determine whether an institution could charge search and preparation fees for electronic documents that were responsive to requests made under the *Access to Information Act* (*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405; <http://bit.ly/1NAcWnJ>; background, "Reference: Fees and electronic records": <http://bit.ly/1MPY7zU>; summary: <http://bit.ly/1lzydOz>).

This was the first time the Commissioner had brought such a reference under subsection 18.3(1) of the *Federal Courts Act*. The Court accepted that a reference under this provision was a valid mechanism for the Commissioner to seek guidance on a question or issue of law.

In the reference proceedings, the Commissioner took the position that "non-computerized records," for which a search and preparation fee could be assessed under the Regulations of the Act, means records that are not stored in or on a computer or in electronic format.

On March 31, 2015, the Federal Court rendered its decision and agreed with the Commissioner's interpretation that electronic records are not "non-computerized records." This means that institutions must not charge fees to search for and prepare electronic records.

The Court did not accept the arguments of the Attorney General and of the intervening Crown corporations that, following a contextual analysis, existing electronic records such as emails, Word documents and the like are non-computerized records.

The Court accepted the ordinary meaning of the words "non-computerized records" as being the correct interpretation of that expression. Its view was that "in ordinary parlance, emails, Word documents and other records in electronic format are computerized records" and records that are machine-readable are computerized.

The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Federal Court's decision when conducting investigations.

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"There is a hint of Lewis Carroll in the position of those who oppose the Information Commissioner:

'[w]hen I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

"The question is," said Humpty Dumpty, 'which is to be master – that's all."

—*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405, paragraph 65  
(<http://bit.ly/1NAcWnJ>)

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## Who controls the records?

The Commissioner investigated a complaint that a requester had not received from **Public Works and Government Services Canada** (PWGSC) all the relevant records in response to his request for information about building work carried out in relation to a health and safety complaint. A subcontractor to the principal contractor—the principal contractor was hired by PWGSC to provide building management services—had carried out the work.

Over the course of the investigation, the principal contractor found several batches of relevant records. Although these records were eventually disclosed to the requester, PWGSC claimed that they were not under its control, but rather under the control of the contractor. It asserted that it had no "legal or contractual obligation to retrieve documents" from third-party contractual service providers.

The Commissioner provided PWGSC with formal recommendations about its approach to retrieving records held by third-party contractual service providers, including the following: that PWGSC ensure that all records under its control, whether or not they are in its physical possession, are retrieved and processed in response to requests; that policies and supporting training to employees be implemented explaining the issue of control as it applies to contractors; and that PWGSC ensure that all contractors are aware of the requirements of the Act.

In its response to the Commissioner's recommendations, PWGSC continued to maintain that the determination of whether PWGSC has control of a record held by a third party is established, in part, by determining whether it has the "legal or contractual obligation to retrieve documents." The Commissioner has told PWGSC that this restrictive definition is inconsistent with the Supreme Court of Canada's decision about the control of records and is inconsistent with accountable and transparent delivery of PWGSC's provision of real property services.

This issue remains outstanding between the Commissioner and PWGSC, although PWGSC has agreed to continue to work with the Commissioner to reach a solution for future requests.

## Recommendations for transparency

On March 30, 2015, the Commissioner released a special report to Parliament called *Striking the Right Balance for Transparency* (<http://bit.ly/1Ce7y8W>). In this report, the Commissioner describes how the *Access to Information Act* no longer strikes the right balance between the public's right to know and the government's need to protect limited and specific information. She concludes that the Act is applied to encourage a culture of delay and to act as a shield against transparency, with the interests of the government trumping the interests of the public.

To remedy this situation, the Commissioner issued 85 recommendations in the report that propose fundamental changes to the Act, including the following:

- extending coverage to all branches of government; improving procedures for making access requests; setting tighter timelines;
- maximizing disclosure;
- strengthening oversight;
- disclosing more information proactively;
- adding consequences for non-compliance; and
- ensuring periodic review of the Act.

The Commissioner's recommendations are based on the experience of the Office of the Information Commissioner with the Act, as well as comparisons to leading access to information models in provincial, territorial and international laws.

Updating the law becomes more urgent with each passing year. The Act came into force in 1983. Much has changed within government since that time, including how the government is organized, how decisions are made and how information is generated, collected, stored, managed and shared. The Open Government movement has increased Canadians' expectations and demands for transparency. The law has not kept pace with these changes. There has been a steady erosion of access to information rights in Canada over the last 30 years that must be halted with a modernized access to information law.

## Chapter 2

The Information Commissioner is the first level of independent review of government decisions relating to requests for access to public-sector information. The *Access to Information Act* requires the Commissioner to investigate all the complaints she receives.

In 2014–2015, the Commissioner received 1,738 complaints and closed 1,605. The difference in the total number of complaints closed as compared to 2013–2014 is due to two reasons. First, there were a number of complex investigations in 2014–2015 (as described in Chapter 1) that required the dedicated attention of a number of investigators. Second, there was a reduction in financial resources available.

The overall median turnaround time from the date a file was assigned to an investigator to completion was 83 days.

At the end of the fiscal year, the Commissioner's inventory of complaints was 2,234 files.

Appendix A contains more statistical information related to the complaints the Commissioner received and closed in 2014–2015.

### Summary of caseload, 2010–2011 to 2014–2015

	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015
Complaints carried over from previous year	2,086	1,853	1,823	1,798	2,090
New complaints received	1,810	1,460	1,579	2,069	1,738
New Commissioner-initiated complaints*	18	5	17	12	11
Total new complaints	1,828	1,465	1,596	2,081	1,749
Complaints discontinued during the year	692	641	399	551	416
Complaints settled during the year	18	34	172	193	276
Complaints completed during the year with finding	1,351	820	1,050	1,045	913
Total complaints closed during the year	2,061	1,495	1,621	1,789	1,605
Total inventory at year-end	1,853	1,823	1,798	2,090	2,234

\*The Commissioner may launch a complaint under subsection 30(3) of the *Access to Information Act*.

## Mediation

The Commissioner conducted a mediation pilot project in 2014–2015 to resolve certain complaints more quickly, without the need for full investigations.

Of the 318 files chosen for the project, 70 percent were mediated to one of the following outcomes:

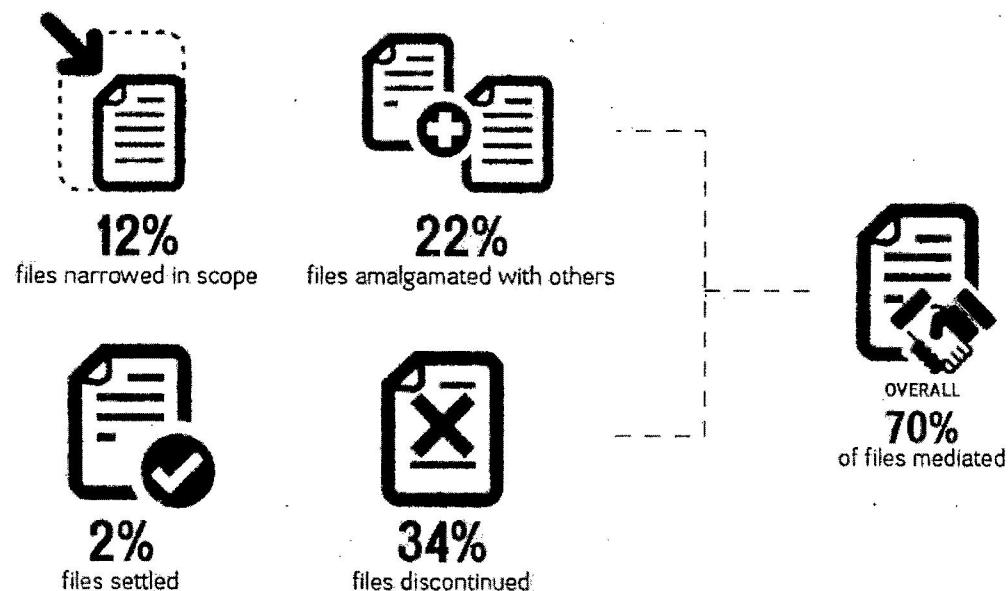
- scope narrowed;
- amalgamated with other similar files;
- settled by agreement of the parties; or
- discontinued.

An example of the scope of a file being narrowed occurred when a complaint against **Aboriginal Affairs and Northern Development Canada** that originally involved roughly 11,500 pages was narrowed to 500 following discussions with the complainant. In another file, against **Industry Canada**, approximately 4,700 pages were narrowed to 10. Narrowing the scope of files allows the investigator to focus on the records that are of greatest importance to the complainant and often results in files being completed more quickly. It also reduces the workload for institutions and the Commissioner.

When the Commissioner amalgamates files, it is usually because a single complainant has a number of complaints against one institution, often on the same or similar subject matters. Joining the files together makes it possible for the Commissioner to determine what information is the most important to the complainant and to work on those priorities, thus increasing efficiency. For example, the Commissioner amalgamated 25 files against the **Canada Revenue Agency** and was able to settle them all at once.

When matters are settled, the institution and complainant agree to close the file without a full investigation. For example, a meeting between representatives of the Commissioner and **Bank of Canada** officials, plus correspondence between the Office of the Information Commissioner and both the institution and the complainant, led the Bank to agree to fully disclose records about a complaint of alleged employee misconduct. In another instance, a complainant agreed to settle a complaint against **Citizenship and Immigration Canada** after being given the opportunity to confirm that the document the institution proposed to release was the document he sought.

### Outcome of mediated files



A complaint may be discontinued at any time, either as a result of mediation efforts or during an investigation. For example, when mediating a complaint against **National Defence**, an investigator found that some records a complainant sought were available from the courts. The complainant obtained the records and the complaint was discontinued. In another instance, the Commissioner determined that she had previously dealt with a complaint similar to one against the **Bank of Canada**, which had resulted in the release of additional records. These records were sufficient for the complainant, who then discontinued the complaint.

## Timely access: A basic obligation under the Act

In the era of social media and the 24-hour news cycle, requesters expect a constant stream of information at their fingertips. However, responses to access requests often do not live up to that expectation.

In the spring of 2015, for example, the response to a parliamentary written question showed that many institutions had active requests dating back several years, with the oldest originating in January 2009. In addition, the responses to 58 percent of the 251 requests reported were overdue, even though institutions had claimed lengthy time extensions in some instances.

The use of long extensions or failing to meet deadlines indicates that institutions are not fulfilling one of their most basic duties under the Act, that of timely access.

In 2014–2015, the Commissioner registered 569 delay-related complaints against 47 institutions. Delay complaints are either about institutions missing the deadline for responding to requests or about the time extensions they take to process requests.

The following are noteworthy investigations related to timeliness that the Commissioner completed in 2014–2015.

### Parks Canada

The Commissioner investigated why **Parks Canada** had missed its March 2014 deadline to respond to a request for information about Parks Canada's purchase of an Ontario property. Through her investigation, the Commissioner learned that the delay had been caused in part by the subject-matter expert within Parks Canada,

### Timeliness of responses to access requests eroding

The most recent annual statistics from the Treasury Board of Canada Secretariat suggest that timely access to government information is still out of reach in many regards (figures from 2013–2014):

<http://bit.ly/1Kxm9xa>:

- **Fewer requests completed in 30 days.** The proportion of requests institutions completed in 30 days in 2013–2014 dropped to 61 percent, from 65 percent in 2012–2013.
- **More request responses late.** The proportion of all requests institutions answered after the deadline grew to 14 percent, up from 11 percent in 2012–2013.
- **Longer time extensions to respond to requests.** Between 2012–2013 and 2013–2014, the proportion of all time extensions of more than 120 days climbed from 13 percent to 19 percent. Over the same period, the proportion of extensions for 30 days or less dropped from 34 percent to 21 percent.

who had sent the requested records to the access office for processing one month after the response to the requester was due. The file had also lain dormant in the access office at various times.

During the investigation, the Commissioner asked Parks Canada on more than one occasion to commit to a date to respond to the requester. Each time, the Commissioner found the proposed timeframe to be too long, with too much time set aside for various steps in the response process, including taking 11 weeks for internal approvals. After the Commissioner gave the institution's chief executive officer her recommendations to release the records, the institution committed to releasing the requested records in January 2015.

In light of this complaint and others like it, the Commissioner launched a systemic investigation in 2014–15 to examine Parks Canada's approach to processing access requests.

## Delays responding to the Parliamentary Budget Officer

Delays in the response process also became evident during three investigations of complaints made by the Parliamentary Budget Officer. The Parliamentary Budget Officer provides independent analysis of the nation's finances, the government's estimates and trends in the Canadian economy. He complained to the Commissioner

### Access delayed is access denied

In her special report to Parliament on modernizing the Act, the Commissioner made a number of recommendations to amend the *Access to Information Act* to promote timeliness (<http://bit.ly/1KvIUDd>):

- limit time extensions for responding to requests to 60 days, and require the Commissioner's permission to take longer ones;
- allow extensions, with the Commissioner's permission, when institutions receive multiple requests from one requester within 30 days;
- replace the exemption for information about to be published with an extension covering the publication period and require the institution to release the information if it is not published when the extension expires; and
- give the Commissioner the power to order institutions to release records to requesters.

about delays in receiving information from various institutions about the possible impact fiscal restraint measures announced in Budget 2012 might have on their service levels.

The Parliamentary Budget Officer had originally asked deputy ministers for this information outside the access to information regime in April 2012. Having received few responses to his queries, he sought the same information through formal access to information requests in the summer of 2013. However, several institutions, including **Fisheries and Oceans Canada**, the **Royal Canadian Mounted Police (RCMP)** and **Environment Canada**, did not meet their deadlines for responding.

Through her investigations, the Commissioner found that a number of circumstances had led to the delays. Indeed, these three files featured several of the common problems that result in delays: files not advancing in the access office, unnecessarily long time extensions taken for consultations on a small number of pages, and multiple consultations taken consecutively rather than concurrently.

To resolve the complaints, the Commissioner asked the three institutions for a work plan and commitment date for responding to the requester. Fisheries and Oceans Canada provided a response in February 2015, and the RCMP and Environment Canada in March 2015.

### Counteracting the culture of delay

Counteracting the culture of delay that leads to complaints about timeliness requires senior officials in institutions—up to and including deputy ministers and ministers—to exercise consistent and continuous leadership. The Commissioner made a number of timeliness-related recommendations in her special report on modernizing the Act that are intended to bring discipline to the Act with regard to response times (see box, "Access delayed is access denied"). The Federal Court of Appeal's decision in *Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56, is also expected to instill more discipline in the process of taking and justifying time extensions (see "The culture of delay," page 9). The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision when conducting investigations.

### Maximizing disclosure for transparency and accountability

The Supreme Court of Canada has recognized that the "overarching purpose" of the *Access to Information Act* is to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at para. 61, <http://bit.ly/1LL2WtL>). Having access to information held by government institutions helps ensure citizens can participate meaningfully in the democratic process and also increases government accountability.

However, the right of access is not absolute. The Act stipulates that the general right of access may be restricted when necessary by limited and specific exceptions (<http://bit.ly/1HA1BoN>).

The Commissioner has come to the conclusion that the current exceptions to the right of access do not strike the right balance between the public's right to know and the government's need to protect limited and specific information. Broad exemptions and exclusions in the Act allow more information to be withheld than is necessary to protect the interests at stake.

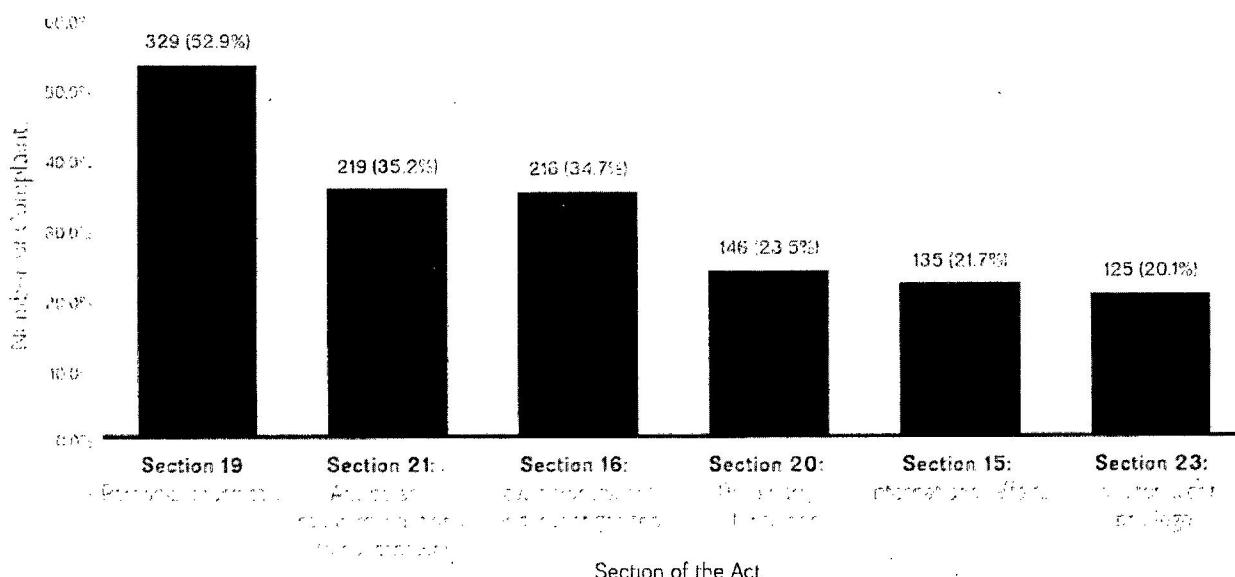
This conclusion is supported by disclosure rates across the government. There has been a significant drop in the percentage of requests for which institutions release all information over the years.

The graph below sets out the most common exemptions cited in complaints the Commissioner registered in 2014–2015.

"The public is prevented from holding its government to account under the current regime. And it's not necessarily the fault of people who administer the system—the people who work and process your access requests—but the law is very heavily tilted in favour of protecting government information."

—Information Commissioner Suzanne Legault,  
speaking to Carleton University students during  
Right to Know Week, 2014

#### Commonly cited exemptions in refusal complaints registered, 2014–2015



NOTE: The sum of all percentages may exceed 100 percent because a single complaint may involve multiple exemptions.

#### Section 19 (Personal information)

Section 19, which is a mandatory exemption for personal information, is by far the most cited exemption by institutions when they respond to access requests. Institutions invoked it more than 20,000 times in 2013–2014. More than half (53 percent) of the refusal complaints the Commissioner registered in 2014–2015 (329 complaints) involved section 19.

The *Privacy Act* defines "personal information" as "information about an identifiable individual that is recorded in any form." (<http://bit.ly/1DwWECQ>). This definition is incorporated into the *Access to Information Act* by reference.

Section 19 contains a number of circumstances that allow institutions to release personal information that they would otherwise have to withhold. These circumstances include that the person to whom the information relates consents to its release or that the information is publicly available.

## Bringing section 19 up to date

In her special report on modernizing the Act, the Commissioner made the following recommendations related to section 19 (<http://bit.ly/1f696Yi>):

- require institutions to seek the consent of individuals to whom personal information relates, whenever it is reasonable to do so, and require institutions to disclose that information once consent is given;
- allow institutions to disclose personal information to the spouse or relatives of deceased individuals on compassionate grounds;
- allow personal information to be disclosed when there would be no unjustified invasion of privacy; and
- exclude workplace contact information for non-government employees from the definition of "personal information."

## Applying section 19 too broadly

While acknowledging that the exemption is mandatory, the Commissioner has found that institutions apply it too broadly in many instances.

A notable example of this in 2014–2015 related to a request for records about the seizure by RCMP officers of improperly stored firearms from homes affected by the 2013 flood in High River, Alberta. Citing section 19, the RCMP withheld information that identified where in each residence the weapon had been recovered. The descriptions of the locations ranged from the vague ("in residence") to the more specific ("closet of master bedroom" and "under the bed in the bedroom"). The RCMP argued that releasing such information could make it possible to identify the homeowners. The Commissioner did not agree with the RCMP. As a result of the Commissioner's investigation, the RCMP released the information.

## Seeking consent

Section 19 allows institutions to release personal information when the person to whom it relates consents to its disclosure. However, the Act is silent as to when an

institution should seek the consent of an individual. While some individuals refuse to grant consent when asked, others agree, which often results in more information being released to the requester. During two investigations closed in 2014–2015, the Commissioner recommended that institutions seek consent from individuals to release their personal information. In the first instance **National Defence** asked eight individuals to release their names and scores on a job competition. These individuals declined. In contrast, 10 people involved in meetings with the **Department of Finance Canada** related to possible changes to the *Income Tax Act* did consent to having their personal information released, and additional information was disclosed to the requester.

## Releasing information on compassionate grounds

The Commissioner often receives complaints from relatives who are seeking information about the death of a loved one. A common reason they complain to the Commissioner is that an institution withholds information under section 19. In these situations, the Commissioner frequently recommends that the institution consider releasing the information on compassionate grounds, when doing so would be in the public interest and would clearly outweigh the invasion of privacy of the deceased. As a result of an investigation into a complaint about the **RCMP** refusing access to information related to a workplace accident that resulted in a death, the Commissioner made this recommendation. The RCMP consulted the Office of the Privacy Commissioner on the matter. The requester, a relative of the deceased, subsequently received additional records from the RCMP.

## Publicly available information

Work-related contact information of non-government employees is personal information and is therefore protected from disclosure by section 19 (*Information Commissioner of Canada v. Minister of Natural Resources*, 2014 FC 917; see "The scope of personal information," page 37).

One complaint about **Health Canada**'s refusal to release work-related contact information of non-government employees centred on the names and contact information of participants in a study on the possible health effects of wind turbines. The institution argued that some

participants were not government employees and that, therefore, their personal information had to be protected. However, subsection 19(2) allows for the release of personal information when it is already publicly available. The investigator found that much of the information at issue was on Health Canada's website, although the institution said that it was not at the time of the request. Health Canada subsequently released the information in question to the requester.

## Section 21 (Advice and recommendations to government)

This provision exempts from disclosure a wide range of information relating to policy- and decision-making. There is a public interest in protecting such information to ensure officials may provide full, free and frank advice to the government. There is also a public interest in releasing this kind of information so citizens may get the information they need to be engaged in democracy and hold the government to account.

Institutions invoked this exemption nearly 10,000 times in 2013–2014. More than one third (35 percent) of the refusal complaints the Commissioner registered in 2014–2015 (219 files) involved section 21.

In her investigations, the Commissioner often finds that institutions have applied section 21 too broadly and are unable to show how the information falls within one of the various classes of information the exemption is designed to protect.

### Partisan letters on a website

#### **Foreign Affairs, Trade and Development Canada**

(DFATD) cited section 21 when it withheld large portions of communications and briefing materials about the posting of partisan letters on the former Canadian International Development Agency's website. The requester noted in her complaint that she had made similar requests in the past but had never seen the records treated in this manner before.

The Commissioner's investigation found that some of the withheld information did not qualify for the section 21 exemption. For example, DFATD had exempted factual information, which does not fall within the parameters of section 21. In addition, DFATD had redacted some details in certain places but released the same information in others. In response to the Commissioner's recommendations, DFATD provided more information to the requester.

### Narrowing section 21

In her special report on modernizing the Act, the Commissioner recommended the following to narrow the scope of section 21 (<http://bit.ly/1GRGmsW>):

- extend the list of specific examples of information to which section 21 does not apply to include factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution;
- reduce the time the exemption applies from 20 years to five years or once the decision to which the advice relates has been made, whichever comes first; and
- add a "reasonable expectation of injury test."

In her report, the Commissioner also recommended that there be a general override for all exemptions to ensure that institutions take the public interest in disclosure into account when considering whether to apply any of the exemptions within the Act.

Institutions should be specifically required to consider factors such as open government objectives; environmental, health or public safety implications; and whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person. Given the type of information covered by section 21, this override would be particularly useful in helping maximize disclosure and fostering transparency and accountability.

### Defunding the Canadian Environmental Network

**Environment Canada** exempted under section 21 large portions of a briefing note to the Minister of the Environment about whether to continue funding the Canadian Environmental Network. The requester complained to the Commissioner about this response. The institution argued that most of the information in the briefing note was advice and recommendations to the Minister. Through her investigation, however, the Commissioner found that not all the information qualified for the exemption and recommended the

institution complete a detailed review of the records. Following this recommendation, Environment Canada reconsidered its use of section 21 and in some instances exercised its discretion to release additional information. This resulted in the institution withholding only the minimum amount of information that specifically required protection. The additional information released included background, contextual material related to the decision, headings and references to attachments.

### Funding of programs related to violence against Aboriginal women

A requester asked the **Department of Justice Canada** for information regarding violence against Aboriginal women that was created during a specific time period. In its response, the institution withheld under section 21 information on approval documents and applications for funding under two programs related to violence against Aboriginal women. Through her investigation, the Commissioner found that the institution had broadly applied section 21. The Commissioner concluded that much of the withheld information did not meet the requirements for the exemption and asked the institution to reconsider its position. In response, the institution abandoned the application of section 21 in some instances. In others, the institution took into account the passage of time and the fact that the funding decision had been made and decided to exercise its discretion to release more information. In the end, all but limited and specific information was released.

An additional positive outcome of the investigation was that the institution changed its approach to processing access requests related to grants and contributions records. The institution also said it would amend a paragraph of the Conditions section of the application form for these programs to indicate that in the event of an access request the information in the application would be disclosed, except for personal information.

### Section 16 (Law enforcement and investigations)

This provision protects information related to law enforcement. Section 16 covers the work of a wide range of federal bodies, including the RCMP, the Canadian Security Intelligence Service and the Canada Revenue Agency.

Institutions invoked section 16 more than 7,900 times in 2013–2014. Section 16 was the subject of 35 percent of the refusal complaints the Commissioner registered in 2014–2015 (216 files).

### Narrowing the scope of section 16

In her special report on modernizing the Act, the Commissioner noted that paragraph 16(1)(c), which exempts information the disclosure of which could harm law enforcement activities and investigations, is sufficient to balance the protection of law enforcement-related information with the right of access (<http://bit.ly/1f6aTMZ>). In light of this, she recommended that other paragraphs under section 16—related to techniques for specific types of investigation, for example—be repealed.

There is a public interest in both protecting information under this provision, to ensure law enforcement activities can progress unimpeded, as well as ensuring that information is released such that Canadians can hold law enforcement bodies to account.

### Political activities of registered charities

In 2014–2015, the Commissioner investigated a complaint against the **Canada Revenue Agency** (CRA) related to letters it had sent to registered charities reminding them of the limits they must respect with regard to their political activities. In response to an access request, CRA had refused to release a two-page document containing instructions for preparing these letters, saying that disclosing the instructions would prejudice future enforcement of the *Income Tax Act*. The Commissioner questioned CRA about its use of section 16 for procedural information of this type and found that the institution could not substantiate the harm that could occur if the documents were disclosed. CRA subsequently released the two pages to the requester.

### Prejudicing an investigation that is closed

Institutions often cite section 16 in order to withhold information so as not to prejudice ongoing investigations. The **Canadian Human Rights Commission** (CHRC) took this approach and withheld an entire investigation file in response to a request, without considering whether any information could be severed and the rest released. During the investigation into the resulting complaint, the Commissioner learned that the institution had refused to release the file, despite the fact that the matter was concluded, although not officially closed in the case management system. The Commissioner questioned how releasing the requested records could prejudice an

ongoing investigation when the one at issue was essentially complete. Although the requester did receive the records, it was only as the result of a second request he made at the suggestion of the CHRC.

## Section 20 (Third-party information)

This provision protects third-party business information, including trade secrets. The government collects third-party information through a number of avenues, such as during the grants, contributions or contracting process, as a part of regulatory compliance, or through public-private partnerships. The Supreme Court of Canada has noted that third-party information may often need to be protected, since it "may be valuable to competitors ... and [disclosure] might even ultimately discourage research and innovation" (see *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 2, <http://bit.ly/1NzRMWl>). At the same time, dealings with private sector entities should be as transparent as possible for accountability reasons.

Institutions invoked this provision 5,300 times in 2013–2014. It was cited in nearly one quarter (24 percent) of the refusal complaints (146 files) the Commissioner registered in 2014–2015.

### Proprietary information

A requester asked **Public-Private Partnership Canada** (PPP Canada) for records about its dealings with a company, Geo Group Inc., a provider of correctional, detention and community re-entry services. The institution refused access to some of the records, claiming section 20. During her investigation, the Commissioner learned that Geo Group had been asked for its position on disclosure by telephone only. Geo Group's position at that time was that all the information in question was proprietary and that releasing it would damage the company's ability to market its services.

The Commissioner questioned both PPP Canada's use of section 20 and the process undertaken to consult Geo Group. Under section 27, an institution is required to advise a third party of its intention to disclose third-party records and provide a third party with an opportunity to make representations in writing. The third party is to be given 20 days to provide these representations.

As a result of the Commissioner's investigation, an appropriate consultation was undertaken with Geo Group, after which PPP Canada decided that some of the information should, in fact, be released. (Geo

Group Inc. had the opportunity to seek judicial review of this decision but did not do so.) The Commissioner then asked PPP Canada a second time to reconsider its position on continuing to withhold other information under section 20, which it did. In the end, the institution released all but a small amount of the withheld information to the requester.

### Financial consumer protection

In 2013 the **Financial Consumer Agency of Canada** published a paper on mobile telephone payments and consumer protection in Canada. In this paper, the authors referred to a study by the agency about the communications habits of new Canadians and urban Aboriginals. A requester asked for a copy of this study. In response to this request, the institution withheld 100 of 106 pages, citing section 20. The institution took the position, based on the representations of the third party that had prepared the study, Envirionics Analytics, that the exempted information was proprietary and that releasing it would harm its commercial interests.

## Striking the right balance with section 20

In her special report on modernizing the Act, the Commissioner recommended that section 20 contain a two-part test. The test would allow third-party information to be withheld only when:

- the information falls within a specific class; and
- disclosure of the information could reasonably be expected to result in a specific injury, such as significant harm to a third party's competitive or financial position, or result in similar information no longer being supplied voluntarily to the institution (<http://bit.ly/1NA5Q2v>).

To maximize disclosure, the Commissioner also recommended that the Act explicitly state that institutions be required to release information when the third party to whom it relates consents.

In addition, she recommended that institutions not be allowed to apply section 20 to information about grants, loans and contributions third parties receive from the government, since Canadians have a right to know how this public money is spent.

However, the Commissioner found through her investigation that the institution could not substantiate the expected harm. The Commissioner explained to the institution the criteria that needed to be met in order to apply section 20, after which the institution agreed to go back to the third party to reconsider its position. Subsequently, the institution released some additional information to the requester.

## Section 15 (International affairs)

This provision exempts information from disclosure which, if released, could reasonably be expected to injure the conduct of international affairs or the detection, prevention or suppression of subversive or hostile activities.

Institutions invoked section 15 more than 11,100 times in 2013–2014, an increase of 4 percent from 2012–2013. The provision was cited in 22 percent of refusal complaints the Commissioner registered in 2014–2015 (135 files).

### Conference contribution and budget figures

In 2014–2015, the Commissioner investigated a decision by the **Canadian Security Intelligence Service** (CSIS) to withhold under section 15 the amount it had contributed to a 2011 conference at Université Laval and the annual budget of its Academic Outreach program. In her investigation, the Commissioner found that CSIS had not provided sufficient evidence to show that releasing the information could reasonably be expected to injure

### Bringing clarity to section 15

In her special report on modernizing the Act, the Commissioner recommended replacing the word "affairs" in section 15 with "negotiations" and "relations" to be clearer about what aspects of Canada's international dealings would be harmed by releasing information (<http://bit.ly/1UdTr9h>).

Since institutions often rely on the classification status of historical information to justify non-disclosure under section 15, the Commissioner also recommended that the government be legally required to routinely declassify information to facilitate access.

efforts to detect, prevent or suppress subversive or hostile activities. Moreover, the Commissioner discovered that CSIS's logo had appeared on the conference program, which was posted on the Internet, so its involvement in the event was publicly known. In light of the Commissioner's investigation, CSIS agreed to release the amount of its contribution to the conference but not the Academic Outreach budget figures. The Commissioner continues to disagree with CSIS about withholding this information but the complainant did not provide consent for the Commissioner to file an application for judicial review.

## Section 23 (Solicitor-client privilege)

This provision covers information subject to solicitor-client privilege.

Institutions invoked section 23 nearly 2,250 times in 2014–2015. The provision was cited in 20 percent of the refusal complaints the Commissioner registered in 2014–2015 (125 files).

Section 23 is a discretionary exemption that applies both to information privileged as legal advice and records that were created for the dominant purpose of contemplated, anticipated or existing litigation. While the latter privilege expires at the conclusion of litigation, legal advice privilege has no time limit. In some instances in the government context, there are public interest reasons to release information protected by solicitor-client privilege in order to ensure greater transparency and accountability. Consequently, when exercising their discretion to withhold information that is protected by solicitor-client privilege, institutions should consider all relevant factors, such as the age of the information, its subject matter and historical value.

### Records of historical value

The issue of protecting historical records under section 23 arose during an investigation with **Library and Archives Canada** in 2014. The request had been for information that dated from the First World War and had to do with an application to the Supreme Court about why a soldier had been detained and sent to prison on charges of refusing to obey orders while on military service. The requester was confused as to why the institution had released personal records related to the soldier, but would not release those related to the government's work to prepare for the soldier's court hearing.

## Narrowing the application of section 23

In her special report on modernizing the Act, the Commissioner recommended that section 23 not apply to aggregate total amounts of legal fees (<http://bit.ly/1T8JmbW>).

She also recommended imposing a 12-year time limit on when institutions could withhold information under section 23 as it relates to legal advice privilege, starting from when the last administrative action was taken on the file.

The requester complained to the Commissioner, who asked Library and Archives Canada to review the records. This resulted in its releasing one of four pages. The remaining pages at issue were a 1918 legal opinion from the Department of Justice. The legal opinion was on the meaning of the term "commitment" in what was then section 62 of a since-repealed version of the *Supreme Court Act*. The legal opinion referred to case law, some of which dated to the 1800s, as well as statutes such as the *Lunacy Act* and the *Hospitals for the Insane Act* of 1914. Both of these statutes were repealed decades ago.

The Commissioner found that the institution had properly determined that legal advice privilege applied to the legal opinion, but that it had not considered all the relevant factors for and against disclosure, including the age and historical significance of the information, when deciding to withhold it.

Throughout the investigation, the institution, on the advice of the Department of Justice Canada, refused to waive solicitor-client privilege on the records, despite their being nearly a century old.

At the conclusion of her investigation, the Commissioner formally recommended to the Minister of Canadian Heritage that the three pages be disclosed in light of the relevant factors that favoured disclosure. In response, the Minister referred the matter to the Librarian and Archivist for Canada, since he has delegated authority for access matters at the institution. The Librarian and Archivist responded that the three pages of records would be disclosed.

leg 10(2)

The Commissioner is often asked to investigate complaints about institutions withholding billing information for legal counsel.

One such file involved **Blue Water Bridge Canada**, which had withheld in its entirety a two-page document comprising a cover letter and a statement of account from a legal firm. The Commissioner disagreed that solicitor-client privilege applied to these records. Upon consideration, the institution agreed with the Commissioner that the cover letter was not covered by solicitor-client privilege and released it to the requester. With respect to the statement of account, the Commissioner advised the institution that aggregate total amounts billed (such as appeared on the statement of account) tend to be neutral information and disclosing them does not reveal privileged information. Subsequently, the institution released these totals to the requester.

The **Department of Justice Canada** is frequently the subject of complaints about its decisions to withhold legal fee amounts. In two investigations the Commissioner closed in 2014–2015, the institution took the position that it could exempt this information under section 23 because it was related to ongoing litigation. In contrast, the Commissioner determined, based on case law, that releasing that information would not reveal any privileged information. The investigations resulted in more information, including the fee totals, being released to the requesters.

## Other notable investigations

### Neither confirming nor denying the existence of a record

Subsection 10(2) of the Act allows institutions, when they do not intend to disclose a record, to neither confirm nor deny whether the record even exists. When notifying a requester that they are invoking

### Limiting subsection 10(2)

To help curb the misuse of subsection 10(2), the Commissioner recommended in her special report on modernizing the Act that the provision be limited to several very specific purposes—for example, when releasing the information would injure a foreign state or organization's willingness to provide Canada with information in confidence or when it would injure law enforcement activities or threaten the safety of individuals (<http://bit.ly/1CeeGSA>).

subsection 10(2), institutions must also indicate the exemptions on which they could reasonably refuse to release the record if it were to exist.

Since 2012–2013, the Commissioner has received 50 complaints about institutions' use of subsection 10(2), with half of them coming in 2014–2015.

Subsection 10(2) was intended to address situations in which the mere confirmation of a record's existence (or non-existence) would reveal information that could be protected under the Act. This could include, for example, the identity of CSIS targets or the activities of RCMP investigators.

However, the Commissioner's investigations found several examples of institutions using subsection 10(2) inappropriately. For instance, the **Department of Justice Canada** cited the provision in response to a request for a letter from the Costa Rican foreign minister in which the minister asked for information from the institution, and the institution's response. Through her investigation, the Commissioner learned that Costa Rican authorities had essentially publicly acknowledged that it had asked the Department of Justice Canada for the information in question. As a result, the institution ceased to rely on subsection 10(2) and released the records to the requester, albeit with many exemptions applied.

In another instance, **DFATD** cited subsection 10(2) in its response to a request for information about the visit of a Canadian consular official to an internment camp in Afghanistan. The Commissioner found through her investigation that the official did, in fact, visit the camp and that the institution's public affairs group had released this information. In light of this, the institution reconsidered its position and released all the requested records to the requester.

## Does dressing up in a costume threaten a person's safety?

A request was made to the **Canada Revenue Agency** for copies of videos presented to CRA staff. CRA released a DVD containing a number of the requested video clips introducing various parts of the organization, but withheld one clip. The withheld clip showed various employees wearing Batman costumes and was protected under section 17. The requester complained to the Commissioner about the institution's response.

Section 17 protects information when disclosure could reasonably be expected to threaten the safety of a person; it should not be used for the purpose of concealing embarrassing information. In light of the requirements of section 17, the Commissioner asked CRA to provide evidence of the harm that would result if the video clip were released. Initially, CRA maintained the application of section 17. After further requests from the Commissioner to show evidence of the harm, the institution eventually offered to allow the requester to view the clip on site, but the requester refused. CRA then proposed sending the requester the clip with the faces of the employees blurred. The requester agreed to this approach.

## Costs associated with mailbox vandalism and graffiti

**Canada Post Corporation** (Canada Post) received a request for incidents reports of vandalism and graffiti to Canada Post mailboxes. The associated repairs and cleanup costs were also requested. In response, Canada Post withheld the information under paragraphs 18(a) and 18.1(1)(a). Section 18 protects the economic interests of government institutions, and paragraph 18.1(1)(a) is Canada Post's unique exemption under the Act to protect its economic interest. The requester complained to the Commissioner and asked her to investigate Canada Post's refusal to disclose the cost information.

## Exemptions and exclusions added by the *Federal Accountability Act*

In 2006, the Act was extended to cover a number of Crown corporations, agents of Parliament, foundations and a series of other organizations as a part of the *Federal Accountability Act*. A number of institution-specific exemptions and exclusions, such as section 18.1, were also added to the Act at this time.

In her special report on modernizing the Act, the Commissioner recommended that a comprehensive review be undertaken of the institution-specific exemptions and exclusions added by the *Federal Accountability Act* to determine their necessity (<http://bit.ly/1SJVHS0>).

As a result of her investigation, the Commissioner determined that the institution had neither provided sufficient justification for the use of the exemptions nor properly exercised its discretion to release information. The Commissioner formally asked Canada Post to substantiate its position, at which point it withdrew its application of paragraph 18(a). It did provide arguments in favour of its continued exemption of information under paragraph 18.1(1)(a), but the Commissioner found them lacking. She wrote to the head of the institution and recommended that Canada Post release the specific cost information, which it did.

## Duty to document decisions

The right of access relies on good record-keeping and information management, so that records are available for access. This right is denied when decisions taken by public officials are not recorded, particularly decisions that directly affect the public and involve the spending of public funds.

In 2014–2015, the Commissioner closed two investigations that determined that officials had not created records to document their decisions. The first investigation, at **Transport Canada**, revealed that the institution had taken no notes or minutes at some of the regular meetings officials had held with the City of Victoria, especially meetings related to the expansion of the harbour in 2010. The Commissioner asked the institution to do another search for records within various divisions and branches, and also to look for information discussed at regular meetings with the City of Victoria. Through these searches, Transport Canada located 10 pages and released them to the requester.

In the second investigation, into a complaint about a request for records regarding a decision to reduce the number of parking spaces in one part of the Experimental Farm in Ottawa, the Commissioner found that **Agriculture and Agri-Food Canada** staff had never created a record of their discussions and the arrangements for implementing this decision. All the records the institution released in response to the access request were from after the decision was taken. The Commissioner learned through her investigation that the decision to reduce the number of parking spots was made verbally and the work had been completed by employees of the Experimental Farm, resulting in minimal documentation. The Commissioner sought and received assurances from the institution that a complete search for records had been done and that any and all employees

who might have been involved in the decision had been asked for records. Some additional records that were created after the requester submitted his request were found during subsequent searches. These were provided to the requester.

## Documentary evidence

In her special report on modernizing the Act, the Commissioner recommended establishing a comprehensive legal duty to document decisions within government, with sanctions for non-compliance (<http://bit.ly/1JAHVBy>). As a result, more information would be subject to the right of access. This would also facilitate better governance, ensure accountability and enhance the historical legacy of government decisions.

## Systemic investigations

### Delays stemming from consultations on records related to access requests

The Commissioner has long been concerned about the impact of inter-institution consultations on the timely processing of requests. Institutions carry out these consultations with other federal organizations, international governments and organizations, other levels of government and third parties about records related to access to information requests.

In 2010, the Commissioner launched a systemic investigation into the use, duration and volume of time extensions for consultations, especially ones that at the time were mandatory under the Act, and the delays to respond to access requests that may have resulted. The investigation focussed on nine common recipients of mandatory consultations under the Act: **Canada Border Services Agency**, the **Canadian Security Intelligence Service**, **Correctional Service of Canada**, **Foreign Affairs and International Trade**, the **Department of Justice**, **National Defence**, the **Privy Council Office**, **Cabinet Confidences Counsel** (PCO-CCC), **Public Safety Canada** and the **Royal Canadian Mounted Police**.

## The challenges of consulting with foreign governments

As part of the systemic investigation on consultations, the Commissioner commissioned a study on the treatment of consultation requests by Foreign Affairs, Trade and Development Canada (DFATD) under sections 13, 15 and 16 of the Act (<http://bit.ly/1LMMV6K>).

At the time the study was prepared (2010), these consultations were mandatory. This meant that in most years, DFATD received more consultation requests than it did access requests.

The study's author, Paul-André Comeau, found that in many instances DFATD had to consult with foreign governments in order to respond to consultation requests. This led to response times of up to 151 days for consultations and had a ripple effect on how

quickly institutions could respond to the original access requests.

The report recommended several ways DFATD could streamline the process it followed at that time for consulting with foreign governments and organizations.

Now that consultations under sections 13, 15 and 16 are no longer mandatory—as a result of the Commissioner's investigation—the number of consultation requests DFATD receives has dropped by 40 percent. The institution reported to the Commissioner in March 2015 that this fact, as well as specific measures it took in response to the systemic investigation, has meant that its average time to respond to a consultation request is now 58 days.

During the investigation, a considerable amount of information was collected from the institutions by way of a questionnaire. The Commissioner commissioned a comparative analysis of international consultations (see box, "The challenges of consulting with foreign governments"). The Commissioner also sought and obtained representations from the nine institutions on their handling of both incoming and outgoing consultation requests.

On the basis of the representations received and evidence gathered in the investigation, the Commissioner concluded that the mandatory consultation process impeded the ability of institutions to provide timely access to requesters under the Act. As a result, the Commissioner made recommendations to the Clerk of the Privy Council

and the Minister of Foreign Affairs to resolve the matter and improve various practices related to consultations to these institutions (see table, page 27). Both have accepted the recommendations.

During the investigation, significant changes were made by the government to two aspects of processing requests that were significant sources of delays: consultations on Cabinet confidences (see "Shedding light on decision making by Cabinet," page 42) and consultations with respect to section 15 (International affairs) and section 16 (Law enforcement and investigations) of the Act. The Commissioner is still monitoring the effects of the changes to the Cabinet confidences process.

Recommendations to the Clerk of the Privy Council	Recommendations to the Minister of Foreign Affairs
[1] That, where it is consulted under the new policy, PCO-CCC respond to such consultations within 30 days, the time within which institutions are generally required to respond to access requests.	[1] That DFATD strive to reduce the average time it takes to complete a consultation request, targeting the 30-day timeframe, mirroring the time period within which institutions are generally required to respond to access requests.
[2] That PCO CCC ensure it is sufficiently staffed to handle the volume of consultation requests it continues to receive under the new policy.	[2] That DFATD continue its efforts to ensure that its access to information office is sufficiently staffed to handle the volume of both access requests and consultation requests received. In addition, that DFATD carry out awareness and training in program areas to emphasize that meeting access to information requirements is a legislative duty.
[3] That when it is consulted, PCO-CCC provide file specific response times to institutions based on all relevant factors, including the number of pages and the subject matter involved.	[3] That DFATD cease providing to the access community its current average turnaround time for responses to consultation requests and instead provide individual guidance on receipt of each request, based on relevant factors, including the number of pages and the subject matter involved.
[4] That PCO-CCC take measures to ensure that there is sufficient training for institutions on the scope and application of section 69 of the Act so as to ensure consistency across government.	[4] That DFATD continue to pursue the possibility of sending consultation requests to foreign governments to those countries' embassies or consulates in Ottawa, or develop an alternative solution to ensure that consultations with foreign governments are completed in a more efficient and timely manner.
[5] That PCO-CCC collect detailed data on the consultation process, statistical or otherwise, which it continues to receive under the new policy.	[5] That DFATD, with a view to making consultations with foreign governments more efficient, consider implementing elements of existing processes that allow Canadian institutions to consult directly with international organizations or pursue other options that would help ensure faster response times from foreign governments.
[6]	[6] That DFATD set fixed time frames for receiving responses to its consultations, and exercise its own authority under the Act to apply relevant exemptions and sever information when consulted institutions fail to respond within the time frames prescribed.
[7]	[7] That DFATD enable its case management system to track the full range of activities associated with both incoming and outgoing consultation requests. In addition, that DFATD carry out in-depth analysis of the information gathered in order to gauge and improve its performance with regard to consultation requests, and inform its decisions on workload allocation of resources.

The Commissioner also made eight recommendations to the President of the Treasury Board in his capacity as the minister responsible for the proper functioning of the access

to information system on measures that would improve practices related to consultations across the federal access to information system (see table below).

Recommendations to the President of the Treasury Board	Response
Clarify in the <i>Directive on the Administration of the Access to Information Act</i> that consulting institutions must fully and accurately respond to an access request when a response to a consultation request is not received from the consulted institution prior to the expiry of the extended due date.	Did not agree
Address the use of lengthy time extensions based solely on average response times by clarifying in the <i>Access to Information Manual</i> that, to be consistent with the statutory duty to assist and the directive, time extensions must take into consideration the volume and complexity of the information at issue.	Agree
Clarify in the manual that while appropriately established precedents may assist in establishing the length of extensions per paragraph 9(1)(b), it is a best practice to obtain an agreed-to response time from the consulted institution.	Agree
Issue guidance to institutions clarifying that closing files with outstanding consultation requests is not consistent with the Act, including the duty to assist.	Agree
Clarify in the manual that institutions consider and apply all exemptions and/or exclusions that they rely on to justify withholding information at the time they respond to the access request, to resolve the issue of institutions' subsequently applying additional exemptions and exclusions during a complaint investigation.	Did not agree
Work closely with PCO and the Department of Justice Canada to ensure consistency in the application of section 69.	Agree
Amend the manual to provide guidance about the timelines for conducting third-party consultations set out in the Act, including advising that an extension per paragraph 9(1)(c) not exceed 60 days, given the statutory requirements of sections 27 and 28.	Did not agree
Clarify in the manual that when an institution does not receive a response from a third party within the statutory timeframe, the institution must issue a decision letter to the third party and make a subsequent release if no application for judicial review is initiated in accordance with the Act.	Agree

In April 2015, the Clerk confirmed progress on the implementation of the recommendations as they related to **consultations for Cabinet confidences**. She reported that the changes to the consultation process had substantially reduced the number of consultations with PCO-CCC. A significant improvement in response times was observed after PCO-CCC eliminated its backlog of consultations on **Cabinet confidences** in August 2014. For the remainder of 2014–2015, PCO-CCC completed 79.6 percent of its consultations within 30 days. PCO-CCC also undertook on-the-job training with seven departmental legal services units and two lawyers from Department of Justice Canada, which allowed for knowledge to be shared and contributed to further reduce the backlog.

### Further consultation-related recommendations

In her special report on modernizing the Act, the Commissioner made other recommendations aimed at addressing problems associated with consultations (<http://bit.ly/1HBw12cl>):

- clarify that institutions may not take extensions to consult internally; and
- state that third parties that do not respond to a consultation request on time will be presumed to have consented to having their information released in response to an access request.

In April 2015, the Deputy Minister of Foreign Affairs also confirmed progress on the implementation of the recommendations. He confirmed that the changes to the Directive on the Administration of the Access to Information Act have had a significant positive impact on the consultations files at DFATD. The number of consultation requests has declined by 40 percent since 2011–2012. The institution has also improved its turnaround time from 2010 by almost 50 percent. Further, the institution is pursuing discussions with the United States and Australia on ways to improve state-to-state consultations.

In June 2015, TBS officials confirmed that changes had been made to the access to information manual to reflect the Commissioner's recommendations.

## Delays stemming from interference with processing access requests

The Commissioner closed a second systemic investigation in 2014–2015. This investigation, launched in 2010, looked

into political or other interference with the processing of access requests and the delays to respond to access requests that may have resulted between April 1, 2009 and March 31, 2010. This investigation was launched as a result of evidence gathered from the institutions surveyed in the 2008–2009 report card process (<http://bit.ly/1NqfISd>).

The investigation focussed on eight institutions: **National Defence, Public Safety Canada, the Canadian International Development Agency** (now Department of Foreign Affairs, International Trade and Development), the **Privy Council Office-ATIP, Health Canada, Canadian Heritage, Natural Resources Canada** and the **Canada Revenue Agency**.

During the investigation, a considerable amount of information was collected from the institutions by way of a sampling of files and interviews with officials.

As part of the investigation, the Commissioner found evidence of delay caused by established delegation orders and resulting from protracted approval processes (see table below).

Issues	Examples
Interference	<ul style="list-style-type: none"><li>Non-delegated individuals (including from a minister's office*) directing access officials to make additional severances or questioning the release of certain records, leading to delay and additional severances</li><li>Staff from ministers' offices conducting consultations outside the access process, resulting in delays and additional severances*</li></ul>
Delays caused by non-delegated individuals	<ul style="list-style-type: none"><li>Program areas not responding to tasking requests in a timely manner</li><li>Non-delegated individuals directing access offices to delay the release of records</li><li>Review of responsive records by the departmental legal services unit</li><li>Approval or review of release packages by non-delegated individuals such as program areas, communications groups, deputy ministers' chief of staff, issues management and ministers' office staff (including requests flagged as sensitive or for briefing)</li></ul>
Delays caused by delegated individuals	<ul style="list-style-type: none"><li>Protracted approval process in the processing of requests, including sign-offs</li><li>Delegated individuals not responding within allotted period</li><li>Hiring of a consultant by a delegated individual to review the work done by access officials</li><li>Requests lying dormant for long periods</li><li>Frequent questions to access officials on release packages, leading to delay</li></ul>

\* See Interference with Access to Information, Part 2, p 37.

Issues	Examples
Delegation of authority	<ul style="list-style-type: none"> <li>Horizontal delegation of authority, where a number of individuals across an institution had the authority to apply the Act</li> <li>Delegation orders requiring multiple layers of senior management review, leading to delays or additional severances</li> <li>Coordinators not having full delegation</li> <li>Approval processes not reflecting the delegation of authority (for example, a number of non-delegated individuals involved in the approval of the release package)</li> </ul>
Delays due to the ATIP unit	<ul style="list-style-type: none"> <li>Lack of resources within access offices</li> <li>Requests lying dormant for long periods</li> <li>Lack of monitoring to ensure proper handling of requests</li> </ul>
Other	<ul style="list-style-type: none"> <li>Lack of proper documentation of interference and delays in the case management system</li> <li>Retrieval of records stored off-site, in regions and abroad, resulting in delays</li> </ul>

As a result of the investigation, most delegation orders of the reviewed institutions were amended to give full delegation to the access coordinator and/or to remove redundant levels of delegation.

This systemic investigation coincided with two individual investigations into allegations of interference at **Public Works and Government Services Canada** (PWGSC) (Part 1: <https://bit.ly/1NDA43H>; and Part 2: <https://bit.ly/1HXRQw1>) in which the Commissioner made several recommendations to the institution to prevent political interference from recurring. She also encouraged all institutions and the Treasury Board of Canada Secretariat to take note of the recommendations and implement them, as needed.

In light of the two PWGSC investigations, the measures implemented by the reviewed institutions in the course of the systemic investigation, turnover of staff within the reviewed institutions and the merger of CIDA with DFATD, the Commissioner decided that the most efficient way to conclude this systemic investigation was to make five recommendations to the President of the Treasury Board in his capacity as the minister responsible for the proper functioning of the access to information system (see box, "Recommendations following the Commissioner's systemic investigation into interference with the processing of access requests"). The Commissioner also discontinued the systemic investigation against the eight institutions. The President of the Treasury Board did not address the Commissioner's recommendations in his response, instead asking for information about specific instances of interference.

## Recommendations following the Commissioner's systemic investigation into interference with the processing of access requests

- That the Comptroller General undertake a horizontal audit to assess compliance with elements of the *Policy on Access to Information* that related to the treatment of requests.
- That TBS specifically include in its annual statistical report data related to high-profile subject matters and delays as a result of internal approvals.
- That TBS implement recommendations stemming from the Commissioner's interference investigations at PWGSC:
  - amend current policies and/or directives governing the processing of requests to set clear protocols for the interaction of departmental access officials and ministerial staff when processing requests;
  - train access and ministerial staff specifically on the latter's lack of delegation for, and limited role in, access matters;
  - review the procedures institutions have in place for reporting instances of possible contraventions of section 67.1 of the Act (destruction of records) to ensure they are sufficient and that the guidelines establishing the procedures, as found in the *Directive on the Administration of the Access to Information Act* and the *Access to Information Manual*, have been considered;
  - reinstate the mandatory requirement in the Directive that institutions have policy measures in place on reporting and investigating alleged breaches of section 67.1 to the head of the institution and to relevant law enforcement authorities;
- ensure that departmental and ministerial staff are trained on the policies established to report allegations of interference;
- require institutions to establish and communicate a process that will address requests by delegated authorities (access coordinators, deputy heads, heads, etc.) and/or non-delegated groups (communications, legal services, Minister's office) for notification about impending disclosures;
- train departmental and ministerial staff members on the requirements of the duty to assist, including the obligation to respond to requests as soon as possible; and
- require institutions to inform the Commissioner about alleged obstruction under section 67.1.
- That TBS consider/study centralizing the access function for institutions.
- That TBS review the legislative changes related to sanctions found in the Commissioner's special report on modernizing the Act and take steps to implement them by way of proposed legislative amendments.

## Chapter 3

A fundamental principle of the *Access to Information Act* is that decisions on disclosure should be reviewed independently of government.

In the case of an access refusal, the Act sets out two levels of independent review. The Commissioner carries out the first review through the investigation process.

When the Commissioner concludes that a complaint is well-founded and the institution does not act upon her formal recommendation to disclose records she may, with the complainant's consent, seek judicial review by the Federal Court of the institution's refusal.

A complainant may also seek judicial review by the Federal Court of a government institution's access refusal, after receiving the results of the Commissioner's investigation.

The Act also provides a mechanism by which a "third party" (such as a company) may apply for judicial review of an institution's decision to disclose information that the third party maintains should be withheld from a requester under the Act.

The Commissioner closely monitors all cases with potential ramifications on the right of access to information and may seek leave to participate in proceedings with potential impact on that right. This includes cases in which a third party has challenged an institution's decision to disclose requested information.

The following summaries review ongoing cases and court decisions rendered in 2014–2015.

### Ongoing cases

#### Commissioner-initiated proceedings

Through her investigations, the Commissioner determines, among other things, whether government institutions are entitled to refuse access to requested information based on the limited and specific exceptions to the right of access set out in the Act.

When the Commissioner finds that an exception to the right of access has not been properly applied, she informs the head of the institution that the complaint is well-founded, and formally recommends that the withheld information be disclosed. On occasions when the head of an institution does not agree to follow this recommendation, the Commissioner may, with the consent of the complainant, ask the Federal Court, under section 42 of the Act, to review the institution's refusal to release the information.

**Access to long-gun registry information and challenge to the constitutionality of the *Ending the Long-gun Registry Act***  
On May 14, 2015, the Commissioner applied, with the consent of the complainant, to the Federal Court for a judicial review of the Minister of Public Safety's refusal to process additional records in the long-gun registry that she had determined to be responsive to the complainant's underlying access request. (For more information, see "Access to information: Freedom of expression and the rule of law," page 4.)

Earlier that same day, the Commissioner had tabled in Parliament a special report detailing her investigation into this complaint (<http://bit.ly/1FmLSs5>).

This special report was tabled shortly after the Government had introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*, which included retroactive amendments to the *Ending the Long-gun Registry Act* (ELRA).

As amended, ELRA retroactively ousts the application of the *Access to Information Act* to long-gun registry records, including the Commissioner's power to make recommendations and report on the findings of investigations relating to these records and the right to seek judicial review in Federal Court of government decisions not to disclose these records. The legislation also retroactively immunizes Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

On June 22, 2015, the Commissioner and Bill Clennett, the individual who had requested the long-gun registry records and made the complaint regarding the handling by the Royal Canadian Mounted Police (RCMP) of his request, filed an application in the Ontario Superior Court challenging the amendments to ELRA enacted by Bill C-59.

This application challenges these amendments on the grounds that they unjustifiably infringe the right of freedom of expression protected in section 2(b) of the *Canadian Charter of Rights and Freedoms* and that, in their retroactive effects, they contravene the rule of law.

As part of the Federal Court proceedings, the Commissioner succeeded in obtaining an order from the Court directing the Minister of Public Safety and the Commissioner of Firearms (who is the Commissioner of the RCMP) to deliver the hard drive containing the remaining long-gun registry records to the Federal Court Registry. The Government of Canada complied with this order on June 23, 2015.

In July 2015, the Commissioner's Federal Court application was stayed pending the outcome of the application to the Ontario Superior Court, which is ongoing.

#### Withholding numbers of a public board

*The Information Commissioner of Canada v. Toronto Port Authority* (T-1453-14)

Background, "The Information Commissioner filed an application for judicial review in *Information Commissioner of Canada v. Toronto Port Authority*": <http://bit.ly/1eVCoYw>.

In June 2014, the Commissioner initiated a judicial review of the **Toronto Port Authority**'s refusal to disclose portions of the minutes of a 2008 meeting of its audit committee.

The institution withheld large swaths of the minutes under sections 18 and 20, claiming that releasing the minutes would harm the organization and reveal confidential third-party information. However, the Commissioner was of the view that the information should not be withheld.

In her investigation, the Commissioner found that the institution did not exercise its discretion reasonably, since there was no indication that it had considered the facts in favour of disclosure, such as the passage of time and that much of the information was in the public domain. She was of the view that the minutes should be disclosed in their entirety.

Before the Federal Court, the institution is also claiming that section 21 (Advice and recommendations to government) applies to the minutes.

The court hearing will be held on October 19, 2015.

In her special report on modernizing the Act, the Commissioner recommended that section 21 be amended to limit its application to five years (<http://bit.ly/1GRGmsW>).

#### Number of individuals on Canada's no fly list

*Information Commissioner of Canada v. Minister of Transport Canada* (T-911-14 and T-912-14)

Background, "Injury to international affairs": <http://bit.ly/1gwA2k4>

In April 2014, the Commissioner applied for judicial review of **Transport Canada**'s refusal under section 15 of the Act to release the number of individuals named on the Specified Persons List (otherwise known as Canada's "no-fly list") between 2006 and 2010, and the number of Canadians on the list during the same period.

Transport Canada said that releasing these numbers could reasonably be expected to injure international affairs and the detection, prevention or suppression of subversive or hostile activities. However, the Commissioner found that the figures did not meet the criteria of section 15 and recommended that the Minister of Transport release them. The Minister declined to do so.

The court hearing will begin on January 20, 2016.

## Complainant-initiated proceedings

After the Commissioner reports to the complainant the results of her investigation of an institution's decision to refuse access to requested records, the complainant may be of the view that more information should be disclosed. A complainant is entitled to ask the Federal Court, under section 41 of the Act, to review an institution's refusal to disclose information. A precondition for such a judicial review is that the Commissioner has completed an investigation of a refusal of access.

### Missing records

*3412229 Canada Inc. et al. v. Canada Revenue Agency et al.* (T-902-13)

Background, "*3412229 Canada Inc. et al. v. Canada Revenue Agency et al.* (T-902-13)": <http://bit.ly/1Dx7Bx0>  
See also, "Missing records at the Canada Revenue Agency," page 8.

The Commissioner investigated the complaints initiated by seven numbered companies about the **Canada Revenue Agency**'s (CRA) refusal to release portions of requested records for various taxation years.

As a result of the Commissioner's investigations, CRA disclosed additional information. However, the companies were not satisfied that they had received all the information to which they were entitled and initiated six judicial review proceedings (later consolidated into one).

Within the context of the judicial review proceedings, the companies indicated that CRA had identified additional records that were responsive to the access requests after the completion of the Commissioner's investigations, and alleged that still more records should exist.

The Commissioner obtained leave to be added as a party to the judicial review proceedings.

The companies subsequently filed complaints with the Commissioner, alleging that there were missing records that would respond to its requests and that CRA had improperly applied exemptions to the additional records that CRA had identified in response to its requests.

Thereafter, the companies asked (and the court agreed) that the judicial review proceedings be held in abeyance until the Commissioner finished investigating the companies' further complaints. These investigations are ongoing.

## Third-party-initiated proceedings

Section 44 of the *Access to Information Act* provides a mechanism by which a "third party" (such as a company) may apply for judicial review of an institution's decision to disclose information that the third party maintains should be withheld under the Act.

Notices of any applications third parties initiate under section 44 are required to be served on the Commissioner under the *Federal Courts Rules*. The Commissioner reviews these notices and monitors steps in these proceedings through information available from the Federal Court Registry and, in some instances, from the parties themselves. The Commissioner may then seek leave to be added as a party in those cases in which her participation would be in the public interest.

In 2014–2015, the Commissioner sought and obtained leave to be added as a party to a number of applications for judicial review initiated under section 44, as follows.

### Personnel rates for government contracts

*Calian Ltd. v. Attorney General of Canada and the Information Commissioner of Canada* (T-291-14 and T-1481-14)

Calian Ltd. filed two applications for judicial review in January 2014 (later consolidated) regarding decisions by **Public Works and Government Services Canada** (PWGSC) to release the "personnel rates" Calian had submitted as part of a government tendering process.

Calian, the successful bidder, claimed that the rates should not be disclosed as per section 20, because they contain confidential third-party information which, if released, would cause harm to the company. Calian also claimed that PWGSC should have exercised its discretion to refuse to disclose these rates because disclosure would interfere with the government's contractual negotiations and result in undue benefits to Calian's competitors.

The Attorney General claimed the inclusion of a disclosure-of-information clause in the contract meant that the information must be disclosed to the requester. The Commissioner agreed with the Attorney General, arguing that the claims of harm were not sufficiently substantiated.

The hearing was held before the Federal Court in Ottawa on June 2, 2015.

In her special report on modernizing the Act, the Commissioner recommended that the mandatory exemption to protect third-party information be amended to include a two-part test. Part of this test would require, when relevant, that institutions show evidence that disclosure could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization (<http://bit.ly/1NA5Q2v>).

#### Contract and tender information

*Recall Total Information Management Inc. v. Minister of National Revenue (T-1273-14)*

Background, "Recall Total Information Management Inc. v. Minister of National Revenue, 2015 FC 848":  
<http://bit.ly/1gwEr6D>

Recall Total Information Management filed an application for judicial review in May 2014 to challenge CRA's decision to disclose contract and tender information related to Recall and the storage of CRA's tax files, which Recall considered ought to be exempt from disclosure under section 20.

Subsequently, the Court allowed a motion by Recall to file additional evidence. On the basis of this new evidence, CRA advised Recall, the Commissioner and the Court that it had reconsidered its original decision to release the information. CRA purported to issue a new decision, by which it would exempt from disclosure parts

of records it had already decided to release. Recall filed a notice of discontinuance on the basis that CRA's original decision on disclosure was no longer operative and was superseded by the second decision.

The Commissioner made a motion seeking a ruling on the legal significance of CRA's second decision, taking the position that the CRA had no authority to issue a new or amended decision, as set out in *Porter Airlines Inc. v. Canada (Attorney General)*, 2013 FC 780 (<http://bit.ly/1V8fPkt>). On July 9, 2015, the Court allowed the Commissioner's motion, finding that CRA's second decision, following the Porter Airlines and other decisions, "has no force and effect." The Court added: "Once a proceeding is initiated, it is the obligation of the Court to determine whether the exemptions to disclosure are applicable; it is not the Minister's decision that determines the exemptions."

The Court ordered the Minister of National Revenue to advise the requester of the position CRA would now be taking in this proceeding.

A hearing date for this matter has been set for September 21–22, 2015.

#### Personal information of officers and employees

*Suncor Energy Inc. v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al. (T-1359-14)*

Suncor Energy Inc. filed an application for judicial review in June 2014 challenging a decision by the **Canada–Newfoundland and Labrador Offshore Petroleum Board** to disclose records that contain the names, telephone numbers and business titles of Suncor employees, as well as other information.

Suncor alleges that the responsive records contain personal information, which is protected from disclosure under section 19. It also claims that the records contain confidential information that should be withheld under sections 20 and 24 of the *Access to Information Act*, which incorporates by reference section 119 of the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

The Commissioner takes the position that the Board reasonably exercised its discretion to disclose the personal information because the employees' affiliation with Suncor was publicly available. She also argues that the rest of the

information at issue is not confidential third-party information and therefore should not be withheld.

A hearing has been set for August 13, 2015, in St. John's, Newfoundland and Labrador.

In her special report on modernizing the Act, the Commissioner recommended that the definition of personal information exclude workplace contact information of non-government employees (<http://bit.ly/1f696Yi>).

#### Personal information of private sector employees (2)

*Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al.* (T-1371-14)

Husky Oil filed an application for judicial review in June 2014 asking the Court to set aside a decision by the **Canada-Newfoundland and Labrador Offshore Petroleum Board** to release the names and business titles of Husky employees as well as other information that Husky alleges constitutes personal information. Husky is of the view that the information should be withheld under section 19 of the *Access to Information Act*, arguing that there is no publicly available information that links its employees to the requested records.

The Information Commissioner was added as a party to the proceeding on July 10, 2014. The case is ongoing.

#### Government grant and contribution programs

*Bombardier Inc. v. Attorney General of Canada and Information Commissioner of Canada* (T-1650-14 and T-1750-14)

Bombardier Inc. filed two applications for judicial review in July 2014 of decisions made by **Industry Canada** to release information relating to Bombardier in the context of several grant and contribution programs. Bombardier Inc. claims that the information should be withheld under section 20 (Third-party information).

Among other things, Bombardier Inc. is asking that the Court declare the decisions to be null and void, on the grounds that Industry Canada allegedly reversed or withdrew its earlier decision about disclosure.

As a result of a motion, the two applications were consolidated and the Court is holding the consolidated application in abeyance until the Commissioner completes her investigations into the matters. Those investigations are ongoing.

In her special report on modernizing the Act, the Commissioner recommended that third-party exemptions not apply to information about grants, loans and contributions given by government institutions to third parties (<http://bit.ly/1NA5Q2v>).

#### Failure of procedural fairness

*Brewster Inc. v. The Minister of the Environment as the Minister for Parks Canada and the Attorney General of Canada and the Information Commissioner of Canada* (T-5-15)

Brewster Inc. filed an application for judicial review in January 2015, asking the Court to set aside **Parks Canada**'s decision to release information related to communications about the Glacier Skywalk Development in Jasper National Park.

Brewster claims that the records contain information that should be withheld under sections 19 and 20. Brewster also alleges that Parks Canada breached its duty of procedural fairness by denying Brewster's request for a time extension to provide comments on the possibility of disclosing the records and by rendering a decision to disclose the records at issue without providing its reasons for doing so.

The Commissioner was added as a party to this proceeding on March 27, 2015. The case is ongoing.

## Discontinued cases

Third parties discontinued the following applications for judicial review under section 44 of the *Access to Information Act*, in which the third parties had challenged government institutions' decisions to release information.

*Simon & Nolan Enterprises Inc. v. Canadian Food Inspection Agency and the Attorney General of Canada and the Information Commissioner of Canada and Corporation Sun Media* (T-1382-14)

In June 2014, Simon & Nolan Entreprises Inc. filed an application for judicial review of a decision by the **Canadian Food Inspection Agency** to release information regarding inspection reports. The company claimed that the information should be withheld under section 20, since it included confidential third-party information, the disclosure of which would cause prejudice to Simon & Nolan.

The Commissioner was added as a party. Simon & Nolan discontinued the application in April 2015.

*Provincial Airlines Ltd. v. the Attorney General of Canada and the Information Commissioner of Canada (T-1429-13)*

Background, "Provincial Airlines Ltd. v. Attorney General of Canada and Information Commissioner of Canada (T-1429-13)": <http://bit.ly/1L463x7>

Provincial Airlines filed an application for judicial review in August 2013 asking the Court to set aside a decision by **PWGSC** to disclose to a requester records relating to a contract awarded to Provincial Airlines under Fisheries and Oceans Canada's National Fisheries Aerial Surveillance Program.

Provincial Airlines discontinued the application in October 2014.

*Bayer Inc. v. The Minister of Health and The Information Commissioner of Canada (T-743-14)*

In March 2014, Bayer Inc. filed an application for judicial review of **Health Canada**'s decision to disclose information contained in an Adverse Drug Reaction report. Bayer Inc. claimed that the information should be withheld under sections 19, 20, 21 and 24.

Following the filing of its affidavits, Bayer Inc. discontinued the matter in August 2014.

*Eli Lilly Canada Inc. v. The Minister of Health and The Information Commissioner of Canada (T-1410-14 and T-1712-14)*

In June and August 2014, Eli Lilly Canada Inc. filed applications for judicial review (later consolidated) of two decisions by **Health Canada** to disclose information found in reports filed with that institution. The Commissioner was added as a party.

Following the filing of the parties' affidavits, Eli Lilly discontinued the proceedings in February 2015.

## Decisions

The following decisions were rendered in 2014–2015 in matters related to access to information.

### Commissioner-initiated proceedings

#### A very lengthy time extension

*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56

See "The culture of delay," page 9.

#### Federal Court reference on fees

*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405

See "Removing a barrier to access: Fees and electronic records," page 10.

#### The scope of personal information

*Information Commissioner of Canada v. Minister of Natural Resources*, 2014 FC 917

Decision: <http://bit.ly/1CebPcl>

Background, "The scope of personal information": <http://bit.ly/1IWyqXy>

In July 2013, the Commissioner applied for judicial review of the refusal by **Natural Resources Canada** (NRCan) to disclose, citing section 19, basic professional information, such as the names, professional titles and business contact information, of individuals working for non-government entities, who may have received data about the complainant's business from NRCan.

The Federal Court dismissed the Commissioner's application on October 3, 2014.

The Court held that all information "about" an identifiable individual is "personal information" unless that information falls within one of the exceptions to the definition of "personal information" set out in section 3 of the *Privacy Act*. "It is hard to imagine information that could be more accurately described as "about" an individual than their name, phone number and business or professional title." Thus, the Court held that NRCan had correctly withheld the information.

The Court went on to consider whether the information should nonetheless have been disclosed under paragraph 19(2)(b), which allows the institution to release personal information that is already publicly available. The Court concluded that, since the information was not available to NRCan prior to the application for judicial review, the information was not publicly available. Therefore, either the condition permitting disclosure under paragraph 19(2)(b) did not exist at the time NRCan refused to release the information or NRCan's refusal was reasonable, because the information only became publicly available after the judicial review began.

The Commissioner did not appeal the Federal Court's decision.

### **Limiting the application of solicitor-client privilege**

*Information Commissioner of Canada v. Minister of Health*, 2015 FC 789

Decision: <http://bit.ly/1gQ7JgU>

Background, "Limits of solicitor-client privilege":  
<http://bit.ly/1P3W7BQ>

In November 2013, the Commissioner applied for judicial review of **Health Canada**'s refusal under section 23 to release portions of documents related to a proposed new drug.

The Commissioner had concluded through an investigation that Health Canada had neither shown that the information met the criteria required to demonstrate solicitor-client privilege nor properly exercised its discretion to waive privilege. The Minister of Health rejected the Commissioner's recommendation to release the information.

In April 2015, the Federal Court found that, with one exception, the records were subject to solicitor-client privilege and therefore that Health Canada had correctly withheld them under section 23. In its ruling, the Court said that, when analyzing whether solicitor-client privilege applies, documents should be considered in the context of "a continuum of communication" between client and counsel, and not in isolation. Thus, although not all of the records were communications exchanged between a lawyer and a client, they were part of the overall privileged communication. The Court did order Health Canada to sever a portion of one record that was not covered by the privilege and release it to the requester.

The Commissioner did not appeal the Federal Court's decision.

## **Complainant-initiated proceedings**

### **Premature judicial proceeding**

*Lukács v. President of the Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267

Decision: <http://bit.ly/1JZrJY2>

In response to an access request for records about investigations of research misconduct, the **Natural Sciences and Engineering Research Council** (NSERC) informed the requester that it could neither confirm nor deny the existence of relevant records as per subsection 10(2) of the Act.

The requester complained to the Commissioner, submitting that NSERC had not, as is required by paragraph 10(1)(b), notified him of the specific provision of the Act on which a refusal could reasonably be expected to be based should the record exist.

As a result of the Commissioner's investigation, NSERC acknowledged that records exist but decided to refuse access to them based on subsection 19(1) (Personal information), paragraph 21(1)(b) (Accounts of deliberations and consultations) and section 23 (Solicitor-client privilege).

In October 2014, the requester filed an application for judicial review of NSERC's refusal to disclose the records. NSERC brought a motion to strike out the proceeding, on the grounds that the application was "so clearly improper as to be bereft of any possibility of success." The Court granted the motion, noting that NSERC was no longer refusing to confirm or deny the existence of responsive records and, therefore, there was no live issue before the Court.

The Court also noted that a judicial review is only available after the Commissioner has reported the results of her investigation to the complainant, which was not the case with respect to NSERC's decision to refuse access based on subsection 19(1), paragraph 21(1)(b) and section 23. As a result, the Court concluded that the judicial review was premature.

The requester did not appeal the Federal Court's decision.

## Unreasonable delay

*Coderre et al. v. The Information Commissioner of Canada*, 2015 FC 776

Decision: <http://bit.ly/1H8VX> (in French only)

A complainant and others applied to the Court on September 12, 2014, under section 18 of the *Federal Courts Act*, seeking an order of *mandamus* requiring the Commissioner to provide her reports of findings to the complainants within 30 days of the requested order being issued. On June 22, 2015, the Court dismissed the application, with costs.

The 12 complaints relate to CRA's refusal to give access to documents regarding reassessments made between April 2, 2014, and September 8, 2014. Both at the time the application was filed and when the Court issued its decision, June 22, 2015, the Commissioner's investigations into these complaints were not concluded.

The Court determined that the applicants had not satisfied one of the conditions required for issuing an order of *mandamus* against the Commissioner: The Commissioner had not failed to carry out a duty imposed by the Act, and no unreasonable delay had elapsed in investigating the applicants' complaints; the longest was slightly more than 14-and-a-half months from the date of the complaint. The Court held that this [translation] "cannot be a delay that exceeds what the nature of the process set out in the [Act] requires *prima facie*."

The Court added that the Commissioner had not refused to carry out the duties imposed on her by the Act and that she had also followed the procedure and the requirements set out by the Act for conducting her investigations.

The Court also agreed with the Commissioner's submissions that granting a writ of *mandamus* in the circumstances would go against Parliament's intention and the entire scheme of the Act, given that [translation] "the Act provides a process with two independent levels to review decisions from government institutions refusing access to documents: the Commissioner is the first level and this Court intervenes only afterward..." [translation].

## No reasonable cause of action

*Whitry v. Office of the Information Commissioner of Canada* (2015-14, Hamilton Small Claims Court)

Background, "Investigation report a pre-condition of a judicial review application": <http://bit.ly/1L46ebI>

In December 2014, a plaintiff filed a statement of claim in small claims court for \$25,000 in alleged damages against the Commissioner regarding an ongoing investigation. The plaintiff had previously brought an unsuccessful application for judicial review regarding this same investigation and other completed ones before the Federal Court and Federal Court of Appeal. Both courts dismissed the application and subsequent appeal, with costs.

The Commissioner brought a motion in the small claims case to strike the plaintiff's claim for failing to disclose a reasonable cause of action and for being an abuse of the court's process. The Court heard the Commissioner's motion to strike on April 20, 2015, in Hamilton.

On June 22, 2015, the Deputy Judge granted the Commissioner's motion to strike and dismissed the claim for disclosing no reasonable cause of action, for being advanced in the wrong court and for being an abuse of the court's process. Costs were awarded to the Commissioner.

## Third-party information

### Contract information

*Equifax Canada Co. v. Canada (Human Resources and Skills Development)*, 2014 FC 487

Decision: <http://bit.ly/1NZ1mmg>

Background, "Equifax Canada Co. v. Minister of Public Works and Government Services Canada et al. (T-1003-13) and Equifax Canada Co. v. Minister of Human Resources and Skills Development et al. (T-1300-13)": <http://bit.ly/1B1oIIV>

Equifax Canada Co. filed two applications for judicial review in June and July 2013. The first related to a decision by PWGSC to disclose the total price paid under a contract between Equifax and the former Human Resources and Skills Development Canada (HRSDC).

This contract was for credit and fraud protection services for individuals affected by HRSDC's loss of an electronic storage device containing the personal information of 583,000 Canada Student Loan borrowers.

The second related to **HRSDC**'s decision to disclose portions of other contracts it had concluded with Equifax. These contracts generally pertained to the provision of credit reporting services to HRSDC by Equifax.

In both cases, Equifax claimed that the information at issue was exempt from disclosure based on subsection 20(1) (Third-party information). The Commissioner was granted leave to be added as a party, and the matters were heard together before the Federal Court in Toronto on May 13, 2014. The Court rendered its decision on May 21, 2014.

With respect to the first application, the Court was unconvinced that Equifax could claim the paragraph 20(1)(d) exemption. It noted that Equifax was essentially arguing that disclosing the contract price would make future negotiations more competitive, grounds insufficient to satisfy the requirements of paragraph 20(1)(d).

However, the Court did find that Equifax satisfied the requirements for the application of paragraph 20(1)(c). The Court considered that "by disclosing the Contract price, there is a real, objective risk that this information will give competitors a head start or "spring board" in developing competitive bids against the Applicant for future contracts for data protection services."

The Court dismissed the second application, deciding that Equifax's arguments did not meet the threshold for the exemption under paragraph 20(1)(c). In particular, the Court found that the information at issue was not **confidential information in a business context**. It also noted that Equifax had no substantial competition for government contracts and, as such, this made the potential of a reasonable expectation of probable harm, were the records disclosed, relatively remote. The Court also found that Equifax's arguments pertaining to paragraph 20(1)(d) were speculative and therefore could not serve as a basis for justifying the application of that exemption.

## Safety incident reports

*Husky Oil Operations Ltd. v. Canada Newfoundland Offshore Petroleum Board and the Information Commissioner of Canada*, 2014 FC 1170

Decision: <http://bit.ly/1HkuB0G>

Background, "*Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board et al. (T-511-13)*": <http://bit.ly/1ICRrB8>

In March 2013, Husky Oil asked the Court to set aside a decision by the **Canada-Newfoundland and Labrador Offshore Petroleum Board** to release information found in safety incident notifications and safety incident investigation reports relating to an oil rig operated by Husky Oil. The company had provided this information to the Board in compliance with the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act* and Regulations.

Husky Oil claimed that the information is privileged under section 119 of this law, such that it may not be disclosed as per subsection 24(1) of the *Access to Information Act*, which lists statutory prohibitions against disclosure.

The Commissioner was added as a party and took the position that the information should not be withheld.

The Court rendered its decision on December 19, 2014. While acknowledging that safety is a concern of the Board, and that there is a public interest in the safe operation of offshore petroleum operations, the Court weighed the business, privacy and other interests at stake against the public interest in disclosure. The Court found that subsection 119(2) establishes a privilege against disclosure, and that disclosure in this case was not required for the Board to administer and enforce the legislation. The Court also held that the public interest alone does not justify disclosure of information generated by offshore petroleum operators.

The Court allowed the application and set aside the Board's decision to release the information.

In her special report on modernizing the Act, the Commissioner recommended that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider, among other factors, environmental, health or public safety implications (<http://bit.ly/1CTWIKB>).

## Chapter 4

The Commissioner works to improve how the *Access to Information Act* is implemented across the federal government. The Commissioner is also active in Canada and internationally, helping develop, implement and improve access laws.

### Balancing open government with access

The Commissioner has been supportive of the government's activities in the area of open government, including Canada's joining the international Open Government Partnership (OGP). At the same time, she has stressed that a strong access to information system is a crucial element of any open government plan.

In a September 2014 letter to the President of the Treasury Board, the Commissioner emphasized that the government's upcoming open government action plan should include a commitment to modernizing the *Access to Information Act* (<http://bit.ly/1NDAYOL>). In her letter, the Commissioner concurred with the independent expert who reviewed Canada's progress on implementing its OGP commitments and who noted that "open data is becoming privileged at the expense of other areas of open government and some of the other commitments that we have made in our OGP action plan to the international community and to Canadians."

In a follow-up letter, the Commissioner made 16 recommendations on the draft plan, released in October 2014. Her recommendations focused on measures to help the government effect a fundamental change in its internal culture to promote the release of information and foster transparency, accountability and citizen engagement (<http://bit.ly/1Uidpja>).

### Ensuring complementary approaches

The Office of the Information Commissioner analyzed the types of datasets available through [open.canada.ca](http://open.canada.ca) and compared them to the information sought through access to information requests.

There are clear differences between the two. For example, at the end of June 2015, the top three downloaded datasets were the National Occupational Classification (NOC) 2011 (Statistics Canada), Government of Canada employee contact information (Shared Services Canada) and fuel consumption ratings (Natural Resources Canada).

In contrast, common themes of access requests from January to May 2015 included terrorism and information regarding the Islamic States, the October 22, 2014, shooting on Parliament Hill, lists of briefing notes to ministers and deputy ministers, and climate change.

The differences between the two groups of information speak strongly to the Commissioner's position that open data and access to information are both essential to optimizing government transparency.

In addition to modernizing the Act to align with the principle of "open by default" and the most progressive national and international standards, the Commissioner recommended that the government provide more guidance and training on information management to public servants; and establish in the law a comprehensive duty to document, with sanctions for non-compliance. The Commissioner also recommended implementing a legal obligation to systematically declassify government records and having institutions release information in accordance with open government principles. Finally, she recommended that the **Treasury Board of Canada Secretariat** (TBS) ensure adequate resourcing of the access to information function and that TBS take a lead role in recruiting, staffing and retaining much-needed access professionals.

The government released the 2014–2016 action plan in November 2014. It did not include a commitment to modernize the Act, nor did it take into account any of the Commissioner's other recommendations. The government did commit to expanding the proactive release of information on government activities, programs, policies and services, and to making information easier to find, access and use. However, the Commissioner is of the view that such disclosure cannot replace a robust access to information system (see box, "Ensuring complementary approaches") nor facilitate the necessary culture change.

## Shedding light on decision-making by Cabinet

Cabinet is responsible for setting the policies and priorities of the Government of Canada. In doing so, ministers must be able to discuss issues within Cabinet privately. The need to protect these deliberations is well established under the Westminster system of Parliament and has been recognized by the Supreme Court of Canada.

Under the current law, Cabinet documents, with very few exceptions, are excluded from the Act under section 69. This means that the Commissioner is unable to review any such records as part of her investigations. In addition, and as the Commissioner noted in her 2013–2014 annual report, the process for reviewing records during the processing of access requests to determine whether they contain Cabinet confidences was changed in 2013. It is no longer carried out by an expert group at the Privy

Council Office (PCO), but by lawyers at each institution (see "Section 69": <http://bit.ly/1Wfyzzg>). The Commissioner is concerned about the implications of this change on the consistency of the application of section 69 and about the increased use of this provision by institutions.

Throughout 2014–2015, the Commissioner monitored the situation. For the first time, during an investigation into a complaint against Public Safety Canada, PCO refused her request to re-review the records at issue to determine whether section 69 had been properly applied. PCO argued that the institution should carry out this step first to ensure it was fully accountable for its decisions about excluding records before PCO got involved. This lengthened the investigation considerably.

Also in 2014–2015, the Commissioner was able to confirm what she had heard anecdotally, that requesters are self-censoring the information they seek through access requests by specifically asking institutions not to process records that might contain Cabinet confidences. A search of the online open data portal containing completed access to information requests from April 2013 to May 2015 found more than 1,700 such instructions from requesters (<http://bit.ly/1FYOgz4>).

### Self-censoring of requests

Institutions invoked section 69 more than 3,100 times in 2013–2014. This is a 49-percent increase from 2012–2013, which followed a 15-percent jump the previous year.

To expedite the treatment of their requests, requesters asked institutions **more than 1,700 times** from April 2013 to May 2015 to not process records containing Cabinet confidences.

The Commissioner will continue to monitor the application of section 69. However, it is difficult to assess whether the provision has been properly applied without being able to review the records. The Commissioner has made several recommendations to amend the Cabinet confidences regime under the Act (see box, "Modernizing the treatment of Cabinet confidences").

## Modernizing the treatment of Cabinet confidences

The Commissioner recommended in her special report on modernizing the Act that Cabinet confidences no longer be excluded from the Act, but rather be subject to an exemption (<http://bit.ly/1f6dGWy>). This would bring Cabinet documents under the right of access and allow the Commissioner to carry out full investigations of institutions' use of the exemption, with the benefit of her being able to view the records at issue.

The Commissioner also recommended that the proposed exemption for Cabinet confidences only apply to information necessary to protect Cabinet deliberations. For example, purely factual or background information would not be allowed to be withheld, nor would analyses of problems and policy options. In addition, the Commissioner recommended that the exemption for Cabinet confidences not apply to information that is 15 or more years old. (Currently, the documents are subject to an almost absolute protection for 20 years.)

To further facilitate transparency, the Commissioner also recommended a statutory obligation for the government to declassify Cabinet and other records on a routine basis.

## Updates to the Policy on Access to Information

In March 2014, the Commissioner wrote to the Secretary of the Treasury Board with comments on proposed changes to the Policy on Access to Information, which governs the administration of the Act (<http://bit.ly/1RoRrfb>). The Commissioner's comments focused on, among other things, how to ensure efficient and effective investigations, and to improve the performance of institutions in responding to access requests.

TBS accepted the Commissioner's recommendation that the policy acknowledge that it is important for institutions to collaborate with her office to help address complaints in a timely manner.

TBS also agreed that the policy should require institutions to document how they exercise their discretion when invoking exemptions that require it, to facilitate the review of refusal complaints. TBS also said it would add a specific mention in the policy that obstructing the investigation of complaints is an offence under the Act. These changes will be implemented in conjunction with TBS's policy suite renewal.

However, the Commissioner remains concerned that TBS did not specifically address the need for accountability measures related to improving institutional performance in order to emphasize the importance of the culture change required. For example, the Commissioner had recommended that the performance agreement of the senior executive responsible for access in each institution cover compliance with the Act, including the resolution of complaints. She also recommended that institutions set and report on specific targets for access to information operations in their *Report on Plan and Priorities* and *Departmental Performance Report*. These and other measures of this type have proven effective in improving performance in individual institutions and in other fields.

## The state of the access system

In October 2014, the Commissioner published her observations on the health of the access system in 2012–2013, including detailed analysis of the annual statistics on access to information operations in 24 institutions (<http://bit.ly/1HfxaBc>).

Based on multiple sources of publicly available information, this analysis provides a comprehensive picture of the state of the access system and sheds light on the possible reasons for the increase in the volume of complaints the Commissioner received the following year.

Given the importance of this work to assessing the health of the access system, the Commissioner will publish her analysis of the data for 2013–2014 in 2015.

As a way to more accurately track and measure institutional performance, the Commissioner recommended in a November 2014 letter to the President of the Treasury Board that Canada's Open Government Action Plan 2.0 include a commitment to report statistics on the administration of the Act on a quarterly basis (<http://bit.ly/1Uidpja>).

## Promoting access across Canada

### Addressing the impact of current issues on access

Information and privacy commissioners and ombudsmen at the federal, provincial and territorial levels from across Canada confer regularly on issues of common and pressing interest, particularly as they relate to upholding the fundamental right of access to government information. In 2014–2015, the Office of the Information Commissioner co-hosted the annual meeting of commissioners and ombudsmen in Ottawa. As a result, the commissioners and ombudsmen issued two joint resolutions on current matters affecting the right of access.

In the first—released in late October 2014 in the immediate aftermath of the deaths of two Canadian servicemen on home soil—the commissioners and ombudsmen underlined the need for Canada to uphold fundamental rights and freedoms while taking steps to enhance security (<http://bit.ly/1nPACMn>). The Information Commissioner followed this statement with a letter to the House of Commons Standing Committee on Public Safety and National Security, sharing her concerns about Bill C-44, *An Act to amend the Canadian Security Intelligence Service Act and other Acts* (<http://bit.ly/1TadxzF>). In her letter, she noted that this legislation would have a negative effect on her ability to carry out her oversight role and on the amount of information that could be subject to disclosure under the *Access to Information Act*.

In the second joint resolution, issued in mid-November 2014, the commissioners and ombudsmen focused on the need for governments to modernize their information management practices to better protect and promote the rights of Canadians in the digital era (<http://bit.ly/1NDCqRe>).

In particular, the commissioners and ombudsmen urged their respective governments to review and modernize their information management frameworks by, among other things, embedding access rights in the design of public programs and systems, and creating a legislative duty for government employees to document their deliberations, actions and decisions. The commissioners and ombudsmen also recommended that governments adopt safeguards to prevent the loss or destruction of information, including digital records, so that they can easily be retrieved when needed, including to respond to access requests.

### 2014 Grace-Pépin Award recipient

Professor Alasdair S. Roberts, a leading researcher in the field of access to information, was the recipient of the 2014 Grace-Pépin Access to Information Award, recognizing outstanding dedication to advancing the principles of access to information (<http://bit.ly/1R9MtTv>).

Professor Roberts, a Canadian currently teaching at the Harry S. Truman School of Public Affairs at the University of Missouri, has written widely on access to information. His 2006 book, *Blacked Out: Government Secrecy in the Information Age*, offers an in-depth analysis of access issues in Canada.

"Throughout his many years of research and writing, Professor Roberts continues to raise the profile of access issues both in Canada and abroad," the Commissioner said on presenting the award. "His body of work is at the forefront of ongoing discussions surrounding government transparency and accountability."

### Assisting with the review of Newfoundland and Labrador's access law

In August 2014, the Commissioner appeared before a committee reviewing Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*. The Commissioner presented her perspective on freedom of information and recommended improvements to the provincial law to help balance the confidentiality required to conduct the business of government with the need to ensure citizens have access to public information such that they can hold their governments to account. The Commissioner also submitted detailed comparative legislative research.

The committee made 90 recommendations to improve and streamline the law, many of which mirrored the Commissioner's recommendations. The provincial government amended the law accordingly, and these changes came into effect on June 1, 2015. Newfoundland and Labrador's access law is now the top-ranked in Canada, according to the Centre for Law and Democracy's Right to Information Rating (<http://bit.ly/1HXXGSQ>).

## Sharing the Commissioner's mandate and priorities with stakeholders

Over the course of the year, the Commissioner and a number of officials from her office spoke about her mandate and priorities to a variety of stakeholders, including Federal Court and Federal Court of Appeal law clerks, members of the federal access to information and privacy community, and new public servants. Reaching out to law and public administration students was also important to raise awareness about the requirements of the *Access to Information Act*. In addition, the Commissioner spoke at access-related conferences organized by the Canadian Bar Association, the University of Alberta and the Office of the Information and Privacy Commissioner of Newfoundland and Labrador.

## Making the case for access on the international stage

Canada, as a pioneer in the field of access to information, has an important role to play in sharing the benefit of its knowledge and experience with the international access community.

In 2014–2015, the Commissioner was part of two panels convened by the Organization of American States (OAS) on equitable access to public information. The first, in August 2014 in Guatemala, focused on best practices associated with the characteristics, powers and composition of oversight bodies, such as information commissioners' offices. In March 2015 in Argentina, the Commissioner and fellow panellists shared their experiences with and thoughts on adopting and implementing access laws.

**This work follows on the development of the 2012 OAS Model Inter-American Law on Access to Public Information and its Implementation Guidelines, to which the Office of the Information Commissioner made a significant contribution (<http://bit.ly/1CfUVtR>).** This work by the OAS was funded by Foreign Affairs, Trade and Development Canada.

As a result of the workshops, some Latin American countries, including Argentina, have either used the Model Law as the basis for their own laws or are in the process of incorporating some of the Model Law's principles into their existing laws. The Commissioner's special report on modernizing the Act was also informed by the Model Law (<http://bit.ly/1U2A3uO>).

## Advising Parliament

As an agent of Parliament, the Commissioner provides advice to Parliament on important access-related matters and on the functioning of her office to ensure sufficient ongoing oversight of the access system.

## Committee appearances

In May 2014, senior officials appeared on the Commissioner's behalf before the House of Commons Standing Committee on Access to Information, Privacy and Ethics to discuss the Main Estimates. The officials spoke about the Commissioner's budget and priorities, and the risks to her office that ongoing financial pressures and a growing workload presented. An appearance by the Commissioner before the same committee in December 2014 also covered the resources her office has available to carry out her mandate.

On January 28, 2015, the Commissioner and several of her fellow agents of Parliament appeared before the Standing Senate Committee on National Finance on Bill C-520, *An Act supporting non-partisan offices of agents of Parliament*. (The agents also sent a joint letter to the committee on the subject: <http://bit.ly/1Llna6z>.) This proposed law seeks to prevent conflicts that could occur or could be perceived to occur between, on the one hand, the official duties and responsibilities of employees of agents of Parliament and, on the other, their past or

## Bill could affect the integrity of investigations

In her remarks to the Senate Standing Committee on National Finance on Bill C-520, the Commissioner spoke about the impact of the proposed legislation on her investigations and the right of access.

"In reviewing the bill many times, Mr. Chair, the only conclusion I can come to is that past political or partisan activity could be used to assert the existence of a possible bias in the conduct of our investigations or audits. If the reason for the collection and publication of this personal information is to assert bias, then that raises very serious issues. It could affect the integrity of our investigations; it would politicize our investigations; and it would definitely undermine our effectiveness as agents of Parliament."

future partisan activities. During her appearance, the Commissioner shared her and her employees' concerns about the bill and how it could affect the work of her office (see box, "Bill could affect integrity of investigations").

## Reporting to Parliament

Each year, the Commissioner issues reports to Parliament (<http://bit.ly/1K3UJel>) to provide perspective on her oversight role within the access to information system and on her work to uphold the principles of access at the federal level.

Early in 2014–2015, the Commissioner published her second report into instances of interference with access to information requests at Public Works and Government Services Canada (<http://bit.ly/1FYrQxM>). (See "Interference at Public Works and Government Services Canada" in the Commissioner's 2013–2014 annual report for more information: <http://bit.ly/1WfuOtG>.)

A highlight for 2014–2015 was the Commissioner's special report on modernizing the *Access to Information Act*, released on March 31, 2015. Called *Striking the Right Balance for Transparency*, the report contains 85 recommendations that propose fundamental changes to the Act to resolve recurring problems (<http://bit.ly/1Ce7y8W>). The Commissioner's

recommendations are also designed to help ensure that the Act is effective in both protecting information that legitimately needs to be protected and allowing requesters to gain access to information to help them hold the government to account.

Some of the report's key points are aimed at creating a culture of openness by extending coverage of the Act to all branches of government; setting tighter timelines for the processing of requests; maximizing disclosure by ensuring that exemptions protect only what is strictly necessary; and strengthening the oversight of the access to information regime.

The Commissioner also issued a special report in May 2015 on her investigation into the treatment by the Royal Canadian Mounted Police of an access to information request for the data in the national long-gun registry (<http://bit.ly/1FmLSs5>; see also "Access to information: Freedom of expression and the rule of law" on page 4). In early June 2015, the Commissioner appeared before both a House of Commons and a Senate committee to present her concerns about the government's bill to remove the national long-gun registry data from the coverage of the *Access to Information Act* (See box, "On the record," for an excerpt of her remarks before the Senate committee.)

## On the record

On May 7, 2015, Bill C-59 was tabled in Parliament. As you know, I have serious concerns with Division 18 of this Bill.

First, this division will effectively make the *Access to Information Act* non-applicable, retroactive to October 25, 2011, even before the coming into force of ELRA [the *Ending the Long-gun Registry Act*]. You must ask yourself why?

Second, Division 18 shields from the application of the *Access to Information Act* a broader scope of records than ELRA ever did. It covers not just the records in the Long-gun Registry as ELRA did, but any records with respect to the destruction of those records.

This probably means that no one will be able to request information about whether the RCMP has really deleted his or her information from the Registry or about how much the destruction of the Registry cost Canadian taxpayers. Indeed, no one will be able to find out what transpired in relation to the destruction of the records at issue in my investigation. This is above and beyond what was ever considered by Parliament in 2012. You must ask yourself why?

Third, if Division 18 is adopted, it would potentially

- nullify the request at issue in my investigation;
- nullify the complaint made to my Office;
- nullify my entire investigation, including production orders—some 30,000 records—and examinations of witnesses under oath;

- nullify my recommendations to the Minister of Public Safety and my referral to the Attorney General;
- nullify my application to the Federal Court;
- nullify the police investigation referred to the OPP;
- nullify all potential administrative, civil or criminal liability of any of the actors involved; and
- essentially nullify the requester's right in this case.

You must ask yourself why?

These proposed changes, Mr. Chair, would retroactively quash Canadians' right of access and the government's obligations under the *Access to Information Act*. It will effectively erase history.

Mr. Chair, Division 18 of Bill C-59 is not an attempt to close a loophole; but rather it is an attempt to create a black hole.

Given the fundamental importance of the right of access and the rule of law in Canadian democracy, I would urge this committee to remove Division 18 (clauses 230 and 231) from this bill.

—Information Commissioner Suzanne Legault,  
remarks to the Standing Senate Committee  
on National Finance, June 3, 2015

## Chapter 5

The Commissioner continued in 2014–2015 to ensure efficient operations and exemplary service to Canadians.

### Shared services

Pursuing opportunities to share services with other organizations is an important priority for the Commissioner. Sharing services allows the Office of the Information Commissioner to take advantage of expertise it does not have in-house, reduce risk, make efficient use of resources and provide better services.

Three IT-related shared services projects are ongoing: migrating to a new human resources information system (MyGCHR); implementing the pay modernization project; and adopting a new financial system that will be shared with the Office of the Privacy Commissioner and hosted by the Canadian Human Rights Tribunal.

In 2014–2015, the Office of the Information Commissioner entered into a memorandum of understanding with Elections Canada and three other organizations to establish a shared approach to internal training and set up a common training calendar.

In 2015–2016, the Commissioner will pursue shared services opportunities related to information technology security.

### Talent management

Talent management is a key priority for the Commissioner to help ensure employees are working to their maximum potential. In 2014–2015, she adapted her talent management program to meet the requirements of the Treasury Board of Canada Secretariat's *Directive on Performance Management* (<http://bit.ly/1HSUMNp>). The Commissioner will continue to enhance this program in 2015–2016.

### Case management system

Early in 2014–2015, the information technology group launched the legal component of the Office of the Information Commissioner's case management system. The legal component interfaces with its investigative counterpart to facilitate reporting and sharing of information between lawyers and investigators.

### Access to information and privacy

For information on the Commissioner's access to information (<http://bit.ly/1f8NZEO>) and privacy (<http://bit.ly/1KBkUNx>) activities in 2014–2015, consult her annual reports to Parliament on these topics on her website.

Appendix B (page 56) contains the annual report of the Information Commissioner *ad hoc*, who investigates complaints about the Office of the Information Commissioner's handling of access requests.

### Audit and Evaluation

As a follow-up to last year's annual report, a threat and risk assessment of the Office's new Workplace 2.0 offices was not conducted in 2014–2015. A similar assessment was completed by another Agent of Parliament located in the same facility as the OIC. As such, the Office will analyze the conclusions of the assessment and consider implementation where necessary. Also, the Office recommended to the Audit and Evaluation Committee, and its members agreed, to postpone the audit of the information technology infrastructure to 2015–2016.

## Chapter 6

### Access to information: Freedom of expression and the rule of law

The upcoming year, 2015–2016, will see the next developments in the Commissioner's application before the Ontario Superior Court challenging the constitutionality of the amendments to the *Ending the Long-gun Registry Act* brought about by the enactment of Bill C-59.

As amended, the *Ending the Long-gun Registry Act* retroactively ousts the application of the *Access to Information Act* to long-gun registry records, including the Commissioner's power to make recommendations and report on the findings of investigations relating to these records and the right to seek judicial review in Federal Court of government decisions not to disclose these records. The legislation also retroactively immunizes Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

The Commissioner's application seeks to invalidate these amendments on the grounds that they unjustifiably infringe the constitutional right of freedom of expression and that they contravene the rule of law by interfering with vested rights of access to this information.

### Scientists and the media

On February 20, 2013, the Environmental Law Clinic at the University of Victoria and Democracy Watch made a complaint to the Commissioner alleging that federal government communications and media relations policies and practices have undergone significant changes in recent years. These organizations also alleged that current policies and practices prevent the media and, through it, the wider public, from obtaining timely access to government scientists to speak with them about publicly funded scientific research of significant national concern.

On March 27, 2013, the Commissioner began a systemic investigation to determine whether government communications and media relations policies are impeding the right of access to information under the Act by restricting government scientists from publicly communicating about their research.

In 2015–2016, the Commissioner intends to complete and report on this systemic investigation.

### Lean process for investigations

The Commissioner will pilot test a "lean process" for investigating complaints in 2015–2016. The objective is to establish clear procedures and to increase predictability for complainants and institutions.

## The future of transparency

Modernizing the *Access to Information Act* remains a priority for the Commissioner. She will continue to speak out on the need to bring Canada's law up to date so it is a relevant and effective tool. She will also stand ready to assist parliamentarians should they decide to modernize the Act once Parliament reconvenes after the fall 2015 election.

## Canada's commitment to open government

The government's current action plan under the international Open Government Partnership comes to an end in 2016. The Commissioner will continue to provide recommendations to the government on the Open Government action plan in order to ensure an integrated vision that recognizes access to information as an important foundation of open government.

## Employer of choice

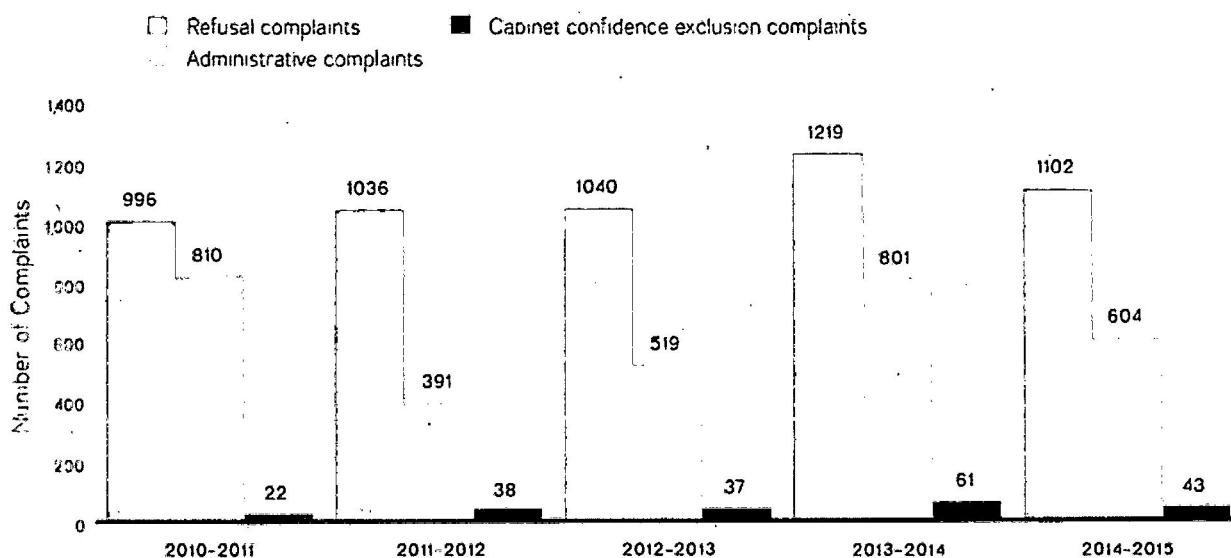
Talent management will continue to be a top-of-mind concern in 2015–2016. The Commissioner will continue to develop the tools and training needed by employees to foster a culture of excellence among her staff.

## Digital strategy

Under her new strategic plan that will be published in 2015–2016, the Commissioner will launch a digital strategy aimed at increasing the use of blogging and social media in an effort to further engage access stakeholders and Canadians. To be a leader in the area of transparency and an agent of change, the Commissioner will also develop targeted approaches to interact with a broader group of stakeholders and develop more sustained interest in access to information.

## Appendix A

### Complaints registered, 2010–2011 to 2014–2015



NOTE: As of April 1, 2013, the Commissioner counts all miscellaneous complaints as refusal complaints. Previously, they had been classified as administrative complaints.

In 2014–2015 the Commissioner received 604 administrative complaints (about delays, time extensions and fees), 43 Cabinet confidence refusal complaints and 1,102 refusal complaints (about the application of exemptions).

The ratio of administrative complaints to refusal complaints registered was 35:65.

	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Citizenship and Immigration Canada	84	66	109	305	246
Canada Revenue Agency	502	324	336	283	221
Royal Canadian Mounted Police	69	68	125	185	178
National Defence	68	74	72	119	118
Transport Canada	77	30	72	83	87
Foreign Affairs, Trade and Development Canada	31	56	83	120	83
Canada Border Services Agency	29	36	63	106	78
Health Canada	81	49	37	48	65
Privy Council Office	57	36	52	48	54
VIA Rail Canada Inc.	2	7	7	2	54
Department of Justice Canada	30	47	24	51	44
Canadian Broadcasting Corporation	183	71	45	61	37
Natural Resources Canada	5	12	21	38	35
Correctional Service Canada	82	65	57	56	33
Employment and Social Development Canada	26	25	20	37	33
Canada Post Corporation	41	46	8	10	30
Canadian Security Intelligence Service	22	8	15	20	27
Environment Canada	15	17	26	29	26
Public Works and Government Services Canada	88	45	35	28	26
Public Safety Canada	21	6	5	14	25

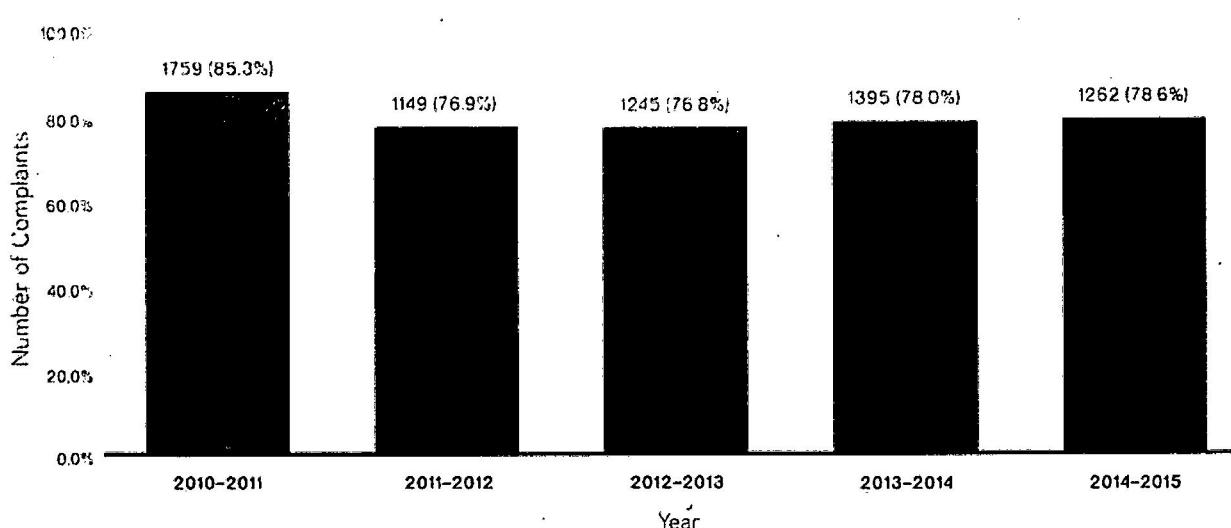
\* Institutions are listed by the number of complaints the Commissioner registered about them in 2014-2015. The figures for each year include any complaints initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (11 in 2014-2015).

\* This chart contains real numbers only and does not reflect the proportion of complaints as compared to the number of requests.

The chart above shows the 20 institutions that received the most complaints in 2014-2015. Many institutions appear on this list from year to year. For example, 2014-2015's top three (Citizenship and Immigration Canada, Canada Revenue Agency and Royal Canadian Mounted Police) were the same as in 2013-2014, although all three institutions received fewer complaints.

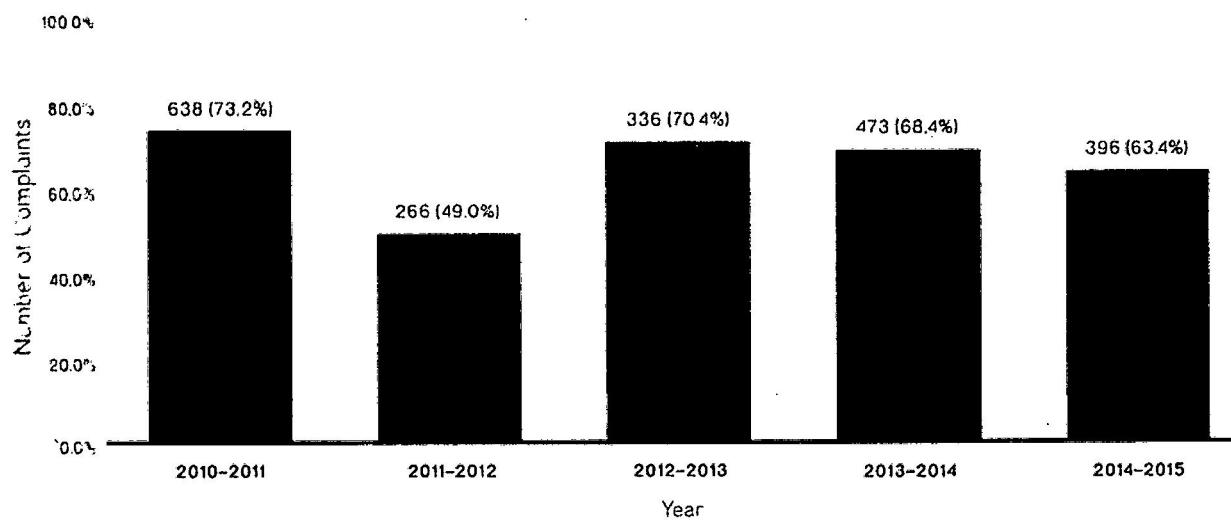
Two institutions made their first appearance on the list in five years: VIA Rail Canada Inc. (due to its receiving a large number of complaints from one individual) and Public Safety Canada.

## Complaints closed within nine months of assignment

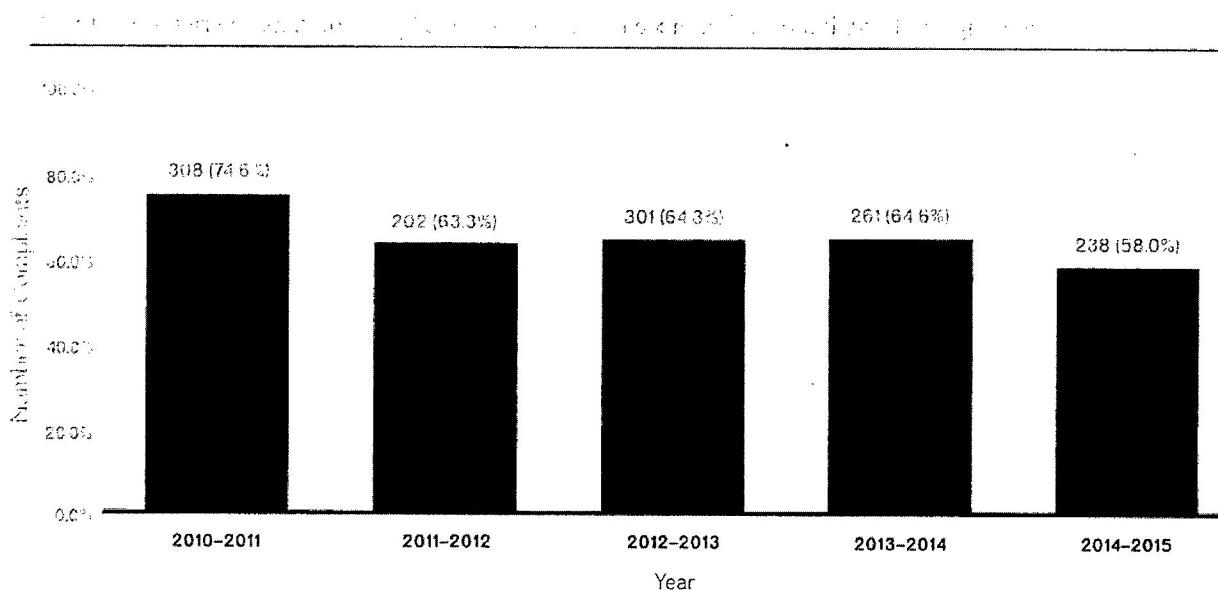


In 2014–2015, the Commissioner closed more than three-quarters (79 percent) of complaints within nine months of being assigned to an investigator. However, given a shortage of staff, there is a gap of about five months (142 days) before a file can be assigned.

## Administrative complaints closed within 90 days from date of assignment



The Commissioner's performance objective is to close 85 percent of administrative complaints within 90 days of their being assigned to an investigator. This rate is not always achievable in part because of the difficulty in obtaining commitment dates and work plans from some institutions. In light of the Federal Court of Appeal's March 2015 decision in *Information Commissioner of Canada v. Minister of National Defence*, the Commissioner will be taking a more stringent approach to the use of extensions. The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision in conducting investigations.



The Commissioner's performance objective is to close 75 percent of her priority and early resolution cases (refusal investigations) within six months from the date they are assigned to an investigator. In 2014-2015, she closed 58 percent of these files in this time frame. This difference from the previous year was due, in part, to a number of more complex investigations (as described in Chapter 1) that required the dedicated attention of a number of investigators.

	Overall	Well-founded	Not well-founded	Settled	Discontinued
Citizenship and Immigration Canada	285	156	39	60	30
Royal Canadian Mounted Police	148	54	32	12	50
Canada Border Services Agency	110	34	10	52	14
National Defence	110	32	20	35	23
Canada Revenue Agency	104	65	8	6	25
Foreign Affairs, Trade and Development Canada	71	20	1	24	26
Transport Canada	61	30	16	0	15
Correctional Service Canada	53	16	11	2	24
Privy Council Office	52	17	2	9	24
Canadian Broadcasting Corporation	41	14	15	9	3
VIA Rail Canada Inc.	40	1	36	3	0
Health Canada	38	20	7	4	7
Employment and Social Development Canada	37	21	2	3	11
Aboriginal Affairs and Northern Development Canada	33	19	1	5	8
Department of Justice Canada	33	4	4	13	12
Industry Canada	32	7	1	2	22
Natural Resources Canada	30	19	3	1	7
Environment Canada	30	10	3	9	8
Public Works and Government Services Canada	26	10	8	2	6
Public Safety Canada	20	6	7	1	6
Others (61 institutions)	251	88	44	24	95
Total*	1,605	643	270	276	416

\*The total number of complaints closed includes any that had been initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (15 in 2014–2015).

This chart lists the 20 institutions about which the Commissioner completed the most complaints in 2014–2015.

## Appendix B

This is the fourth year that it has been my pleasure to report on the activities of the Office of the Information Commissioner, *Ad Hoc*. On April 1, 2007, the Office of the Information Commissioner (OIC) became subject to the *Access to Information Act* (the “ATI Act”; <http://bit.ly/1IVS5qQ>). The law that brought this about did not create at the same time a separate mechanism to investigate any complaints that an access request to the OIC has been improperly handled.

Since it is a fundamental principle of access to information law that decisions on the disclosure of government information should be reviewed independently, the office of an independent Information Commissioner, *Ad Hoc*, was created and given the authority to investigate any such complaints about the OIC.

More specifically, pursuant to subsection 59(1) of the ATI Act, the Information Commissioner has authorized me, as Commissioner, *Ad Hoc*:

... to exercise or perform all of the powers, duties and functions of the Information Commissioner set out in the *Access to Information Act*, including sections 30 to 37 and section 42 inclusive of the *Access to Information Act*, for the purpose of receiving and independently investigat[ing] any complaint described in section 30 of the *Access to Information Act* arising in response to access requests made in accordance with the Act to the Office of the Information Commissioner of Canada.

I am the fourth person to hold this office since 2007.

The following reviews all the complaints my office investigated and closed from April 1, 2014, to the end of my term on May 30, 2015.

### Outstanding complaints from previous year

Three complaints from last year were still outstanding as this year began, all filed by the same person.

The central issue in these complaints concerned the proper application of paragraph 16.1(1)(c) of the ATI Act. This provision exempts from production information *obtained* or *created* in the course of an investigation by the OIC. Once the investigation and all related proceedings are finally concluded, however, the exemption is partially lifted. At that point, the exemption no longer applies to documents *created* during the investigation.

In each case, our investigation revealed that the disputed documents had been obtained during the course of the OIC's own investigations. The OIC was therefore right to apply the mandatory exemption and to refuse to disclose these documents.

In two of these cases, the OIC had also applied the exemption for personal information under section 19 of the Act. Our investigation confirmed that this exemption, too, was correctly invoked.

An interesting issue arose in one of these complaints. The OIC had made two separate responses to the ATI applicant. In the first, which it called its formal response, the OIC applied section 16.1(1)(c) strictly, refusing disclosure of all information obtained by it during its investigation, including the personal information that the requester himself had provided to the OIC. In the second, which the OIC called its informal response, it had given the applicant back his own personal information.

The OIC no longer makes such informal releases. Taking into account comments by this Office about paragraph 16.1(1)(c) in another matter, the OIC has changed its practice. In section 6 of its Annual Report on the Administration of the *Access to Information Act* from April 1, 2013, to March 31, 2014, the OIC explained why it had first adopted this practice, and why it had changed its procedures:

The ATIP Secretariat no longer issues informal releases to individuals seeking access to records pertaining to investigations of their own complaints. It had introduced this practice in the interests of transparency, since otherwise it would be unable, due to the requirements of paragraph 16.1(1)(c) of the Act, to release to requesters information they themselves had provided to the OIC in the context of investigations. The decision to cease this practice was made in light of observations by the Information Commissioner *ad hoc* in the context of an investigation about the OIC's application of paragraph 16.1(1)(c). The Commissioner will address this matter in her upcoming special report on modernizing the Act.

Given this change of procedure, and the fact that the informal release had actually resulted in more information being given to the applicant, not less, this Office concluded that all three complaints were not well-founded.

### New complaints this year

Twelve new complaints were received this year, 10 of them from the same person who had filed the three complaints discussed in the section immediately above. All 12 were investigated and disposed of before the end of my term.

The main issue in the 10 new complaints lodged by the same person, as well as in one complaint filed by another individual, again concerned the proper application of paragraph 16.1(1)(c) of the ATI Act. One also involved an exemption for personal information.

The results of these 11 investigations were the same as for the three similar cases from last year. We found that sections 16.1 and 19 of the ATI Act had been properly applied throughout, and in the one instance in which the OIC had made both a formal and an informal response, that request had been processed before OIC had stopped issuing informal releases.

In the upshot, all 11 of these complaints were held to be not well-founded.

The last new complaint dealt with paragraph 19(2)(a) of the ATI Act, which allows the head of a government institution to disclose personal information if the individual to whom the personal information relates consents to the disclosure. This complaint raised two related issues: first, had the OIC properly sought the consent of the affected individuals and, second, if consent was given, did the OIC retain any residual discretion to refuse to disclose the records?

This last complaint arose out of an access to information request for a list of all access and privacy requests submitted to the OIC in a certain period. With respect to the *Privacy Act* requests, the OIC severed the names of requesters and other personal information, and then disclosed the rest of the information. But the OIC did not ask the *Privacy Act* requesters if they would consent to the disclosure of their personal information. It is longstanding policy of the Treasury Board Secretariat to protect the name of all requesters under both the *Access to Information Act* and the *Privacy Act*. The OIC said that it felt that for it to go against such established policy and to seek consent to the disclosure of personal names would cause distress to the people involved, and be perceived as insensitive to privacy values fundamental to the ATIP regime that the OIC is dedicated to preserving. Since it could see no public interest in releasing such details, it exercised its discretion not to seek consent. This Office agrees with this decision.

As for the ATI Act requests, many of them related to the same subject matter. The OIC realized that, because of the context and the interconnectedness of these records, if they were released even with the names severed it would be possible to figure out the identity or identities of other individuals associated with these documents. This is due to the so-called mosaic effect. This is the idea that when bits of seemingly innocuous information are joined with other bits of equally innocuous information, they sometimes combine to tell a story that the individual pieces by themselves do not. It is similar to what happens when a jigsaw puzzle is assembled from many separate pieces, none of which, by itself, looks like the finished picture. In this case, because these requests overlapped, there was a strong mosaic effect, so the other information was withheld. For this and other reasons, the OIC did not ask the requesters for their consent to the disclosure, direct or indirect, of their personal information.

This Office agreed with this decision, too, except in one instance in which it seemed more information might be safely disclosed. Following discussions with this Office, the OIC contacted the individual to whom the personal information related in that ATI request and sought her consent to its disclosure. This individual consented to the release of the entire document containing her personal information.

Despite the individual's consent to the release of the whole document, the OIC nevertheless continued to exempt portions of the record. The OIC did so because

it said it still believed that, through the mosaic effect, disclosing the entire record would reveal personal information about other people, too. The OIC therefore exercised its discretion under paragraph 19(2)(a) not to disclose the full record, an approach supported by recent Federal Court case law. This Office agreed with the OIC's handling of this request.

This complaint was therefore **resolved**.

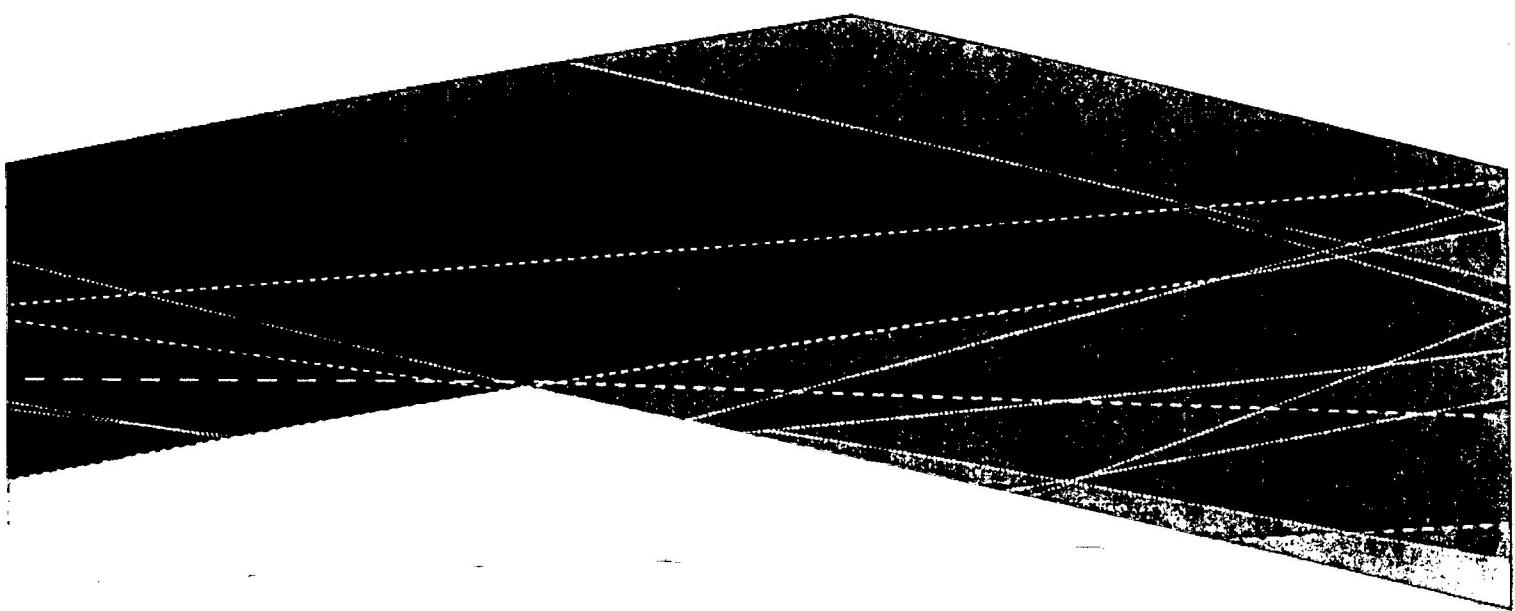
In addition to these 12 complaints, this Office also received two letters about matters that were outside our mandate. One, for example, was from an individual who was dissatisfied with how the OIC had investigated his complaint about how another government department had dealt with his access request. This Office does not have jurisdiction to investigate such cases. Our mandate is limited to receiving and investigating complaints that an access request for a record under the control of the OIC itself may have been improperly handled.

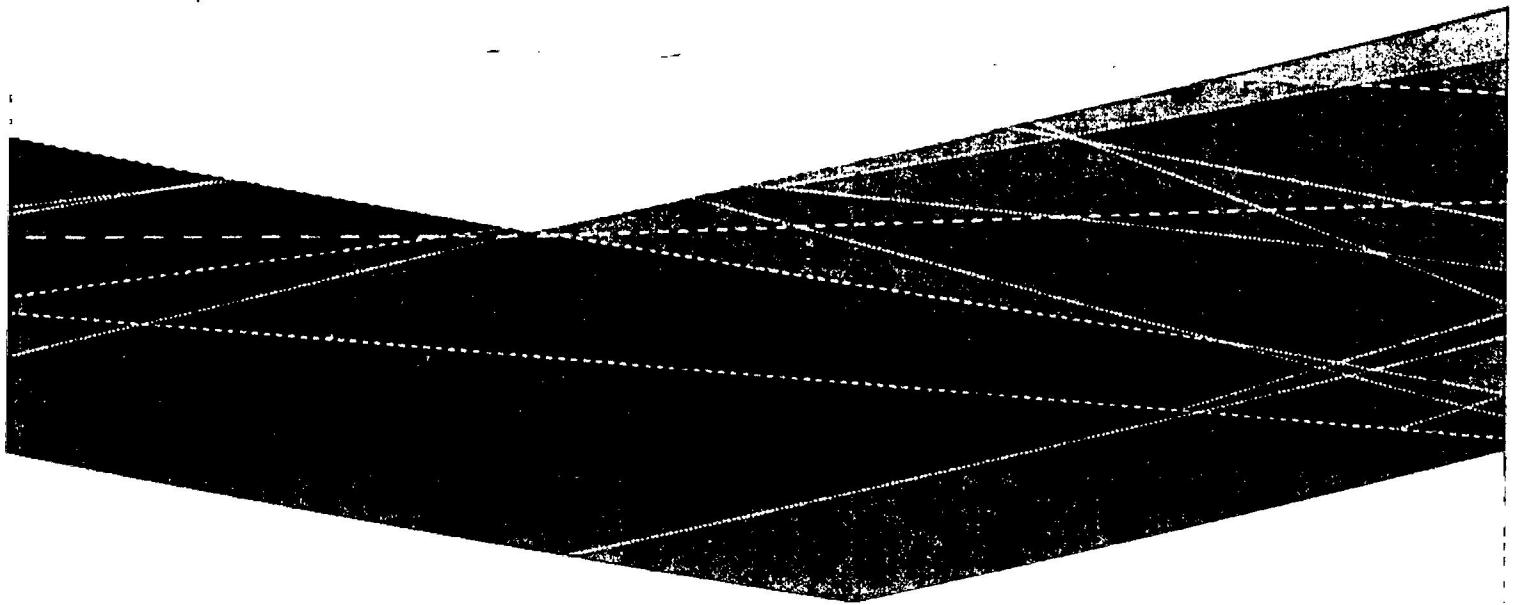
### **Conclusion**

The existence of an independent Commissioner, *Ad Hoc*, ensures the integrity of the complaints process at the OIC. It has been a privilege to serve as Information Commissioner, *Ad Hoc*, these past four years.

Respectfully submitted,

John H. Sims, Q.C.





AAA - 15

000732

Suzanne Legault  
Information Commissioner of Canada  
30 Victoria  
Gatineau QC K1A 1H3

Dear Ms. Legault:

Thank you for your correspondence of November 23, 2015, recognizing our common commitment to enhancing the openness of government and enclosing your March 2015 report to Parliament with recommended changes to the *Access to Information Act*.

I appreciate you highlighting your views about the current challenges posed by the *Access to Information Act* and your invitation to celebrate key milestones in access to information rights together.

I look forward to working collaboratively with your office to further the Government's commitment to openness and would welcome an opportunity to meet.

Respectfully,

The Honourable Jody Wilson-Raybould, P.C., M.P.

c.c.: William F. Pentney  
Deputy Minister of Justice and Deputy Attorney General of Canada



ANNEX 6  
Unclassified  
2015 -014129

## Talking Points Meeting proposed by the Information Commissioner

### Modernization of the *Access to Information Act*

- **Thank you for your detailed and comprehensive report on modernizing the *Access to Information Act*, with eighty five recommendations. I will be reviewing your recommended reforms very carefully.**
  
- **The Government is committed to making government information more accessible and open, including from a broader range of government institutions.**
  
- **I look forward to working collaboratively with you and the President of the Treasury Board to ensure that access to information rights are enhanced.**

Constitutional challenge to the *Ending the Long Gun Registry Act*

- Given that the matter is before the courts, I am restricted in what I can discuss.
- Decisions with respect to this file will be taken in consultation with the Minister of Public Safety.

Invitation to celebrate the history of access to information rights collaboratively

- Thank you for highlighting these important initiatives.
- We look forward to receiving more information about the upcoming events to celebrate access to information rights in Canada.

**PREPARED BY**

Megan Brady

Counsel

Public Law Sector

Tel: 613 954-1618

s.21(1)(a)

s.21(1)(b)

s.23



Department of Justice  
Canada

Ministère de la Justice  
Canada

Protected B: Solicitor-Client Privilege  
FOR INFORMATION

2016-????

**MEMORANDUM FOR THE MINISTER**

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Page 1 of 4  
File name

**Page 737**

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est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(g) re (a), 69(1)(g) re (d)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 738**

**is withheld pursuant to sections**

**est retenue en vertu des articles**

**21(1)(a), 21(1)(b), 23, 69(1)(g) re (d)**

**of the Access to Information Act**

**de la Loi sur l'accès à l'information**

s.21(1)(a)

s.21(1)(b)

s.23



**PREPARED BY**

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613-990-6110, 613-949-2752

QUESTION PERIOD NOTE

Date:  
CCM:  
Classification:

2016-01-20  
2015-014538  
PROTECTED

## Question Period Note

### 2014-15 ANNUAL REPORT OF THE INFORMATION COMMISSIONER OF CANADA

#### ISSUE:

The annual report of the Information Commissioner of Canada was released on December 8, 2015.

#### PROPOSED RESPONSE:

- I wish to thank the Information Commissioner for her Annual Report. I will continue my review of the Report.
- My colleagues and I are committed to review the *Access to Information Act* to ensure that it provides the openness and accountability Canadians expect.
- We consider the Information Commissioner to be an important partner in our review of Canada's access to information system and we look forward to working with the Commissioner and other interested Canadians on this review.

[Note: The President of the Treasury Board is the lead on Access to Information reform.]

## BACKGROUND:

In addition to emphasizing high-profile issues related to the ending of the long gun registry, the 2014-15 Annual Report highlights the following as key concerns: delays in providing access to information; broad interpretations of exemptions to the right of access; and questions about the scope of the application of the *Access to Information Act* to records in ministerial offices, records held by third party contractors and Cabinet confidences.

### ***Modernizing the Access to Information Act***

The Information Commissioner's Annual Report reiterates her calls for a comprehensive review and reform of the *Access to Information Act*. She reproduces many of the recommendations she made in a Special Report to Parliament tabled March 31, 2015, *Striking the Right Balance for Transparency—Recommendations to modernize the Access to Information Act*, linking them with concrete examples of issues identified in recent complaint investigations.

### ***Constitutional challenge to the Ending the Long Gun Registry Act ("ELRA")***

The Commissioner emphasizes June 2015 amendments to the ELRA as the most significant regression in access to information rights in the course of the year. She sees the passage of these amendments as a threat to the rule of law and freedom of expression because they retroactively exempt long-gun registry records from the application of the *Access to Information Act*. The Information Commissioner has initiated a constitutional challenge to the ELRA and, on December 3, 2015, the Ontario Superior Court issued an order granting the Attorney General of Canada three months to obtain instructions on how to proceed.

### ***The year ahead***

In addition to continuing to advocate for a comprehensive legislative reform of the ATIA, the Information Commissioner will be: pursuing her constitutional challenge to the ELRA; completing an investigation into the impact of federal communications and media relations policies on the public's right of access to timely information from government scientists; piloting a "lean process" for complaint investigations; making recommendations on Canada's Open Government commitments; and implementing a social media strategy to improve stakeholder engagement in relation to access to information rights.

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Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

s.23

FOR INFORMATION

NUMERO DU DOSSIER/FILE #: 2016-005483

COTE DE SÉCURITÉ/SECURITY CLASSIFICATION: Secret

TITRE/TITLE:

SOMMAIRE EXÉCUTIF/EXECUTIVE SUMMARY

s.69(1)(g) re (d)

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Soumis par (secteur)/Submitted by (Sector): Public Safety, Defence and Immigration

Responsable dans l'équipe du SM/Lead in the DM Team: Scott Nesbitt

Revue dans l'ULM par/Edited in the MLU by: Matt Ignatowicz

Soumis au CM/Submitted to MO: March 14, 2016



Department of Justice  
Canada

Ministère de la Justice  
Canada

s.21(1)(a)

s.21(1)(b)

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FOR INFORMATION

2016-005483

## MEMORANDUM FOR THE MINISTER

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s.69(1)(g) re (d)

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[REDACTED] s.69(1)(g) re (d) [REDACTED]

**PREPARED BY**

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s.21(1)(a)  
s.21(1)(b)  
s.23

**Pages 745 to / à 746  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**69(1)(d), 69(1)(g) re (a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 747  
is withheld pursuant to section  
est retenue en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 748 to / à 749  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**69(1)(d), 69(1)(g) re (a)**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Pages 750 to / à 776**

**are duplicates**

**sont des duplicatas**



Commissariat  
à l'information  
du Canada

Gatineau, Canada  
K1A 1H3

Office of the  
Information Commissioner  
of Canada

**BY EMAIL AND REGISTERED MAIL**

September 11, 2015

Marc Bosc  
Acting Clerk of the House of Commons  
Building Centre Block  
Floor 2, Room 229-N  
111 Wellington Street  
Ottawa, Ontario  
K1A 0A6

**Re: Request for a “Blue Stamped” Copy of Bill C-59**

Dear Mr. Bosc,

The Office of the Information Commissioner of Canada requests a copy of Bill C-59 - *Economic Action Plan 2015 Act, No. 1 - An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures* (Bill C-59).

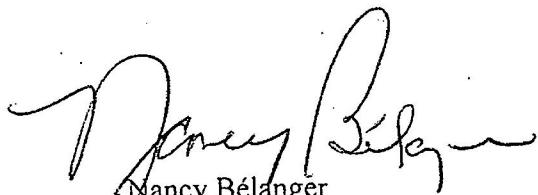
Specifically, the Office requests a copy of Bill C-59 that bears the Department of Justice’s “blue stamp” that the legislation was examined in accordance with section 3 of the *Canadian Bill of Rights*, S.C. 60, and section 4.1 of the *Department of Justice Act* R.S.C. 1985, c. J-2. We understand that the “blue stamp” constitutes the certificates described in s. 3(b) of the *Canadian Bill of Rights Examination Regulations*, C.R.C., c. 394 and s. 3(b) of the *Canadian Charter of Rights and Freedoms Examination Regulations*, SOR/85-781.

The Office is seeking confirmation that the Chief Legislative Counsel provided formal certification that Bill C-59 was subject to the required legislative review to determine whether its provisions are in compliance with the *Charter* and the *Canadian Bill of Rights* and do not unduly infringe on the liberties of Canadians.

The Office of the Information Commissioner of Canada requests these records for the purposes of litigation. The Office is currently before the Federal Court in a section 42 proceeding under the *Access to Information Act*, R.S.C., 1985, c. A-1 (*The Information Commissioner of Canada v. Minister of Public Safety and Emergency Preparedness* T-785-15) and before the Ontario Superior Court of Justice bringing a constitutional challenge against certain provisions of Bill C-59, which is now law, having received Royal Assent on June 23 2015 (*The Information Commissioner of Canada and Bill Clennett v. The Attorney General of Canada*, Court File No. 15-64739).

We respectfully ask to receive a copy by Friday, September 18, 2015.

Yours truly,



Nancy Bélanger  
General Counsel and Director of Legal Services  
Office of the Information Commissioner of Canada

Cc Counsel for the Respondent, Attorney General of Canada (Gregory Tzemenakis, Robert MacKinnon, Helene Robertson)

**Page 779  
is not relevant  
est non pertinente**

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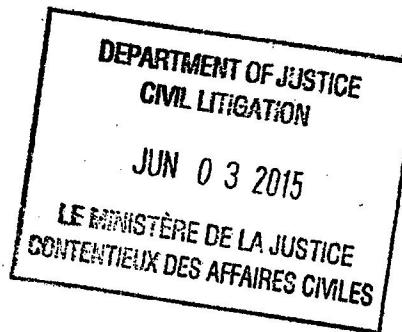
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**BY HAND**

Richard G Dearden  
Direct 613-786-0135  
Direct Fax 613-788-3430  
[richard.dearden@gowlings.com](mailto:richard.dearden@gowlings.com)

June 3, 2015

Gregory Tzemenakis  
Civil Litigation Section  
Department of Justice Canada  
50 O'Connor Street, Room 585  
Ottawa, Ontario  
K1A 0H8



Dear Mr. Tzemenakis:

**Re: The Information Commissioner of Canada v. The Minister of Public Safety and Emergency Preparedness (T-785-15)**

Please find enclosed a Motion Record to preserve the record in issue in this Application and my letter to the Judicial Administrator seeking a date for a special sitting to hear this motion. The Motion Record will be filed with the Court later this afternoon.

Yours truly,

Richard G Dearden

RGD:md  
Encl.

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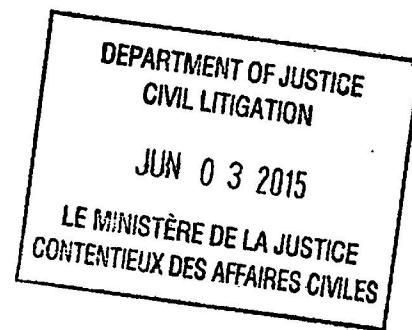
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Richard G Dearden  
Direct 613-788-0135  
Direct Fax 613-788-3430  
richard.dearden@gowlings.com

June 3, 2015

Giovanna Calamo  
Judicial Administrator  
Federal Court of Canada  
Thomas D'Arcy McGee Building  
90 Sparks Street, Main Floor  
Ottawa, Ontario K1A 0H9



Dear Ms. Calamo:

**Re: The Information Commissioner of Canada v. The Minister of Public Safety and Emergency Preparedness (T-785-15)**

1. I am counsel for the Information Commissioner of Canada in the above-noted Application filed pursuant to section 42 of the *Access to Information Act*. I enclose the Applicant's Motion Record seeking an Order requiring the Respondent to deliver to the Registry of the Federal Court the record in issue in this Application. According to the Order sought, the record in issue will be filed as a confidential record. The record in issue is a back-up copy of long gun registry information relating to residents of the province of Quebec that was destroyed from the Canadian Firearms Registry.
2. I am requesting a special sitting for the hearing of this motion to be held as soon as possible in Ottawa. In light of the urgency of this motion, would it be possible to have a special sitting not later than June 9<sup>th</sup>? I anticipate that the argument of the motion will take longer than 2 hours, but less than 4 hours.
3. The reason for the urgency to argue this motion is that it is our understanding that there exists only one copy of the record in issue, which will be destroyed by the Respondent immediately after the enactment of sections 230-231 of Bill C-59. The enactment of Bill C-59 is expected to occur imminently and received Second Reading on May 25th. Bill C-59 amends the *Ending the Long-gun Registry Act* to expunge the application of the *Access To Information Act* to the record in issue and mandates the destruction of the record in issue "as soon as feasible" despite the requirements of the *Access to Information Act*.

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4. Without the Order sought in this motion, the record in issue will be permanently destroyed and cannot be recreated. In addition, a permanent destruction of the record in issue will nullify the Court's power under section 46 of the *Access To Information Act* to examine the record in issue in deciding this Application. Please do not hesitate to contact me should you require additional information regarding this request for a special sitting.

Yours truly,

*Richard G Dearden*

Richard G Dearden

RGD:md

Encl.

cc: Gregory Tzemenakis, Department of Justice, Counsel for the Respondent  
OTT\_LAW\5291693\3

**Pages 783 to / à 791  
are withheld pursuant to section  
sont retenues en vertu de l'article**

**23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**

**Page 792  
is not relevant  
est non pertinente**

**Pages 793 to / à 796  
are withheld pursuant to sections  
sont retenues en vertu des articles**

**21(1)(a), 21(1)(b), 23**

**of the Access to Information Act  
de la Loi sur l'accès à l'information**